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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

NO. _____

ERIC S. SMITH, *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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October _____, 1984

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner is entitled to a review by this Court on Writ of Certiorari, where his suspension from the practice of law was based solely upon an unforeseeable ground first stated in the opinion of the Supreme Court of Kentucky imposing that penalty, and which had not been included or tried with the original Charge filed against him by the Kentucky Bar Association's Inquiry Tribunal.

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OCTOBER TERM, 1984

NO. _____

ERIC S. SMITH, *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, ERIC S. SMITH, respectfully prays that a writ of certiorari issue to review the final Opinion of the Supreme Court of Kentucky entered in this proceeding on July 5, 1984.

QUESTION PRESENTED FOR REVIEW

Whether Petitioner is entitled to a review by this Court on Writ of Certiorari, where his suspension from the practice of law was based solely upon an unforeseeable ground first stated in the opinion of the Supreme Court of Kentucky imposing that penalty, and which had not been included or tried with the original Charge filed against him by the Kentucky Bar Association's Inquiry Tribunal.

OPINIONS BELOW

The original Opinion of the Kentucky Supreme Court was rendered and entered on October 12, 1983. It appears in the Appendix at 9a-13a. In denying the Petition for Rehearing and Modification, the Kentucky Supreme Court modified the October 12th Opinion. The modified Opinion, officially reported as *Kentucky Bar Association* v. *Smith*, 672 S.W.2d 334 (Ky. 1984), was rendered and entered on July 5, 1984. It appears in the Appendix at 2a-8a.[1]

JURISDICTION

On July 5, 1984, Petitioner's petition for rehearing was denied. On July 11, 1984, Petitioner, by Order of the Kentucky Supreme Court, was granted a 90 day stay of the effective date of the modified Opinion, for the purpose of petitioning this Court for a writ of certiorari, Appendix at 46a-47a. This petition for writ of certiorari was filed within that 90 day period. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

This case involves U.S. CONST. amend. XIV, § 1, and the following Rules of the Kentucky Supreme Court: SCR 3.130(1) and 3.150(1), the entire text of each of which is set forth in Appendix at 139a-140a.

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1. An annotated copy of the July 5, 1984 Opinion, detailing the additions to and deletions from the Kentucky Court's October 12, 1983 Opinion, is set forth in Appendix at 132a-138a.

STATEMENT OF THE CASE
PREFACE

This case concerns an anomalous substitution of charges by the Kentucky Supreme Court, at the very end of a disciplinary proceeding, to sustain an attorney's suspension which it had apparently found to be otherwise unsupportable. *Without prior notice or hearing*, the Kentucky Court concluded the proceedings below by suspending Petitioner from the practice of law for conduct *entirely different* than that alleged in the Charge upon which he had been tried.[2] When the highest Court of a State violates the most basic principles of due process, Petition to this Court presents the first and only opportunity for an impartial hearing. Such circumstances compel this Court's review.

THE FACTS

On October 29, 1981, the Inquiry Tribunal of the Kentucky Bar Association (hereinafter "KBA")[3] filed a formal Charge against Petitioner, which alleged that he had violated "Disciplinary Rules 1-102(A)(4), 5-101(A),

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2. Petitioner, an attorney engaged in private practice in Lexington, Kentucky, has *never* before or since been the subject of bar discipline or complaint. His record has been spotless and exemplary. Graduating with honors from Harvard University, he attended the University of Kentucky College of Law, where he served as an editor of the Kentucky Law Journal. Graduating with distinction (and Order of the Coif), Petitioner served as a law clerk for the Kentucky Supreme Court before entering private practice. He has consistently achieved honors and respect in his study and practice of law.

3. In Kentucky disciplinary cases the investigators, tribunal issuing the charge, prosecutors, hearing officer, and finders of fact, are all agents of the Kentucky Supreme Court, which is itself the final finder of fact. The Inquiry Tribunal issues all formal disciplinary charges. SCR 3.190. Under SCR 3.230, the Chairman of the KBA appoints the trial commissioner, who conducts a hearing on such disciplinary charges. SCR 3.360 requires the trial commissioner to submit an advisory report of his factual findings to the KBA Board, which in turn makes advisory findings which it submits to the Kentucky Supreme Court for final action.

5-104(A), 5-105(A), and 6-101(A)(3) of the American Bar Association's Code of Professional Responsibility. . . ," and that his actions therefore "constitute(d) unethical and unprofessional conduct tending to bring the bench and bar of Kentucky into disrepute."[4]

The Charge against Petitioner arose from a transaction in which a corporation owned by one of Petitioner's clients (Dr. Nath) made an unsecured loan of $30,000 to another of Petitioner's clients, a corporation in which Petitioner had a contingent, economic interest.[5] The Charge, based upon the Tribunal's assumption that Petitioner was acting as Nath's attorney in this particular loan transaction, alleged that, in connection with that transaction, Petitioner advised Nath to invest $30,000; failed to disclose material facts about the borrowing corporation and the purpose for which the funds would be used; neglected to prepare legal documents necessary to evidence and secure the loan; was guilty of misrepresentation in stating that he (Petitioner) had no authority to gain access to the borrowing corporation's financial records; took no action to protect Nath's interests; and, that as a result of Petitioner's actions, Nath suffered a loss of approximately $30,000. Petitioner met these charges with proof that full disclosure of his relationship with the borrowing corporation had been made; he had informed Nath of the potential conflict of interest and that he would not, and did not, represent Nath, Nath's corporation, or the borrowing corporation in this particular trans-

4. Charge, Appendix, at 40a-45a. In practice, this last, vague standard has come to be used in Kentucky disciplinary charges as a "boiler plate" conclusion, following allegations of specific rule violations. See SCR 3.130(1).

5. For legal services which Petitioner had rendered to the borrowing corporation, Petitioner had been given a right to receive 5% of the corporation's income and an option to acquire up to 25% of the corporation's stock.

action; he had not advised Nath to invest $30,000, nor had he misrepresented any facts to Nath; Nath had consented to his limited participation in the loan transaction; he did not personally benefit from the loan; and, he was not responsible for Nath's loss, when the borrowing corporation failed.[6] At all stages of the proceedings below, the facts were hotly disputed.

A hearing on the Charge was held before a Trial Commissioner, who heard the evidence and, after receiving briefs from the KBA and Petitioner, made certain factual findings, which were forwarded to the Board of Governors of the KBA (hereinafter "Board") for review.[7] The parties submitted briefs to the Board, contesting the findings of the Trial Commissioner. On February 12, 1983, the Board rendered an Opinion that Petitioner's conduct "... violated the provisions of DR 1-102 [Engaging in Deceit and Misrepresentation], DR 5-101 and DR 5-105 [Accepting Employment which Effects the Independence of the Lawyer or Impairs the Client's Interests], and DR 6-101 [Neglecting a Legal Matter Entrusted to the Lawyer], and that, in sum, *this conduct* has brought the Bench and Bar into disrepute; SCR 3.130(1)."[8] This statement made it clear that *only* the alleged acts and omissions

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6. The sufficiency of Petitioner's proof appears to have been conceded by the Kentucky Court. The Court apparently disregarded the conflicting testimony of the complaining witness (Nath), and based Petitioner's suspension solely upon his own testimony. See July 5th Opinion, Appendix at 4a; and October 12th Opinion, Appendix at 11a.

7. See Report of the Trial Commissioner, Appendix at 24a-39a.

8. Opinion of the Board of Governors, Appendix at 16a (emphasis added). In Kentucky disciplinary cases, the Kentucky Supreme Court is the final finder of the facts and law. The findings, both legal and factual, as well as the disciplinary recommendations of the KBA Board are only advisory. *Kentucky State Bar Ass'n.* v. *Stivers*, 475 S.W. 2d 900, 903 (Ky. 1972), cert. denied 406 U.S. 968 (1972).

which the Board had concluded to be in violation of the enumerated disciplinary rules were being condemned as "tending to bring the bench and bar into disrepute," *not* some other conduct not amounting to a violation of those rules. The Board recommended that Petitioner be suspended from the practice of law for 18 months, and forwarded its recommendation to the Kentucky Supreme Court. Petitioner requested that the Kentucky Supreme Court review his case,[9] and briefs were submitted contesting the findings of the KBA Board.

Upon review, the Kentucky Supreme Court did *not* find Petitioner guilty of violating any of the enumerated disciplinary rules, i.e., *none* of the misconduct which the Tribunal and Board had alleged to be "unprofessional and unethical conduct tending to bring the bench and bar of Kentucky into disrepute." Nevertheless, the Court adopted the Board's decision to suspend Petitioner for 18 months, but based his suspension *solely* upon a *new ground*, not stated in the Charge or the Board's Opinion — Petitioner's own admission that he had, at Dr. Nath's direction, ". . . prepared a check and, to that extent, participated in a transaction whereby one client lent money to another of respondent's (Petitioner's) clients, a corporation in which respondent (Petitioner) had an interest."[10] Although apparently convinced that Petitioner was guilty of *none* of the misconduct alleged in the Charge,[11] the

9. Although the Kentucky Supreme Court is the final ". . . judge of the factual as well as the legal issues and of the final action to be taken" in all disciplinary cases, a request must still be made in order to assure the Court's review. *Stivers, supra* at 903. See SCR 3.370(6).

10. October 12th Opinion, Appendix at 12a. See n. 11, below.

11. Essential to finding a violation of the Disciplinary Rules enumerated in the Charge, or the Board's Opinion, is a prior finding that conflicting attorney-client relationships existed with regard to the par-

(continued on page 7)

Court, at some point in its deliberations, nevertheless concluded that his mere "participation" in the transaction *alone* was sufficiently "unethical" to justify the Board's recommended suspension.[12] The Court cited no rules, case law, or other authority, in support of its conclusion. Petitioner received his first notice that his mere "participation" in the loan transaction would be considered as a ground for discipline *after the proceedings had ended*, when the Court sent him a copy of its October 12th Opinion, ordering his suspension *solely* upon that newly substituted ground.

The Court's Opinion surprised all parties to these proceedings, even the KBA. In initiating and prosecuting the case, the Inquiry Tribunal and counsel for the KBA had *never* suggested, much less advocated, that mere "par-

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(footnote 11, continued from page 6)

ticular transaction in question, i.e. *representation* of conflicting interests. See *In re Advisory Opinion of Kentucky Bar Ass'n*, 526 S.W.2d 306, 307 (Ky. 1974); *In re Advisory Opinion of Kentucky State Bar Ass'n*, 361 S.W. 2d 111 (Ky. 1962). See also Brief Amicus Curiae, Appendix at 94a-97a (hereinafter "Amicus Brief"). The Kentucky Court *never* made such a finding; and, after it was pointed out to the Court (in the Petition for Rehearing, Appendix at 51a-54a) that it is not the mere existence of "conflicting interests," but only *representing* conflicting interests which is prohibited, the Kentucky Court *removed all references to "conflict of interest" in its October 12th Opinion.* See Annotated July 5th Opinion, Appendix at 136a. The Kentucky Court even removed the words "another of respondent's clients," in reference to the borrowing corporation. See Annotated July 5th Opinion, Appendix at 136a. It is therefore clear that, even though the Kentucky Court (in its July 5th Opinion) disregarded the corporate entity of the lender, the Court still did *not* find that the Petitioner had represented conflicting interests in the loan transaction. *Consequently, no violation of the specifically enumerated rules was, or could properly have been, found.* However, even if the Court had found such representation, Petitioner's conduct would still have violated *none* of the Court's adopted Disciplinary Rules. See Amicus Brief, Appendix at 94a-109a.

12. See October 12th Opinion, Appendix at 12a.

ticipation" in a loan transaction is "unethical." Consequently, at *no* prior time in these proceedings had Petitioner's mere "participation" in the transaction been complained of, charged, briefed, tried, condemned, or considered, in any manner whatsoever. Further, at no time prior to the Kentucky Court's October 12, 1983 Opinion was Petitioner (or any other member of the Kentucky Bar) on notice, from the Court's rules, advisory opinions or case law, that mere "participation" in an otherwise lawful loan transaction, without some finding of "wrongdoing," could be considered "unethical," much less punishable.

Using the first and only procedural opportunity to raise his constitutional rights in the proceedings below, Petitioner then filed a petition for rehearing challenging this unforeseeable result. In it, he argued, *inter alia*,[13] that:

13. In its October 12th Opinion, the Kentucky Court stated "(t)he display of poor judgment here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of Respondent." October 12th Opinion, Appendix at 12a. The Petition for Rehearing, however, pointed out that "poor judgment" alone, without any proof of moral turpitude or wrongdoing, had *never* been sufficient grounds for suspension in Kentucky. See Petition for Rehearing, Appendix at 71a-72a; Amicus Brief, Appendix at 109a-111a. As a result, the Court removed the words "display of poor judgment." The Court replaced that phrase with the words "unethical and unprofessional conduct," which resulted in the following unintelligible statement: "(t)he unethical and unprofessional conduct here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of Respondent." July 5th Opinion, Appendix at 6a; Annotated July 5th Opinion, Appendix at 137a.

In both Opinions, the Court's determination of the impropriety of the Petitioner's conduct was apparently influenced by its after the fact observation that the lender had lost money in the transaction. The Court, however, attributed that loss to the fact that the borrowing corporation had become dormant as a result of personal problems experienced by its sole shareholder, and *not* as a result of any actions of Petitioner. October 12th Opinion, Appendix at 11a; July 5th Opinion, Appendix at 4a.

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1.) the Kentucky Court had mistakenly equated the mere existence of conflicting interests with representation of conflicting interests;[14]

2.) his ministerial "participation" in the loan transaction was not evidence of representation of conflicting interests and was certainly not unethical;

3.) by concluding that such "participation" was "unethical," the Kentucky Court created a new rule, proscribing conduct that had never been previously considered a violation of any disciplinary rule or standard; and,

4.) the Kentucky Court violated state and Federal due process guarantees, by retroactively applying its new enlargement of a vague "unprofessional and unethical conduct" standard, without any prior hearing, notice, or warning.

In its Response to the Petition for Rehearing, the KBA also urged the Court to modify its Opinion by finding Petitioner guilty of the Code violations with which he had been charged, in order "to eliminate any unnecessary confusion and misinterpretation" and "to make it absolutely clear

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(footnote 13, continued from page 8)

If, absent any "wrongdoing," the impropriety of an attorney's mere "participation" in a business transaction rests in any way upon an *after the fact* determination of the success of that business venture, then no attorney can be deemed to be on *prior notice* as to whether such "participation" is ethically permissible, because the success of a business venture can *never* be known with certainty from the outset. If and to the extent that the Kentucky Court was influenced by such a factor in judging the propriety of Petitioner's conduct, then Petitioner was to that extent denied his right to procedural due process. See discussion at pp. 20-26, *infra*.

14. See n. 11, *supra* at pp. 6-7.

that the discipline imposed on respondent (Petitioner) is consistent with the Code."[15]

An Amicus Curiae Brief, filed by two attorneys (and endorsed by 21 other practicing attorneys from across Kentucky, and a local county bar association), also challenged the Court's determination that mere "participation" in such a business transaction is "unethical," and urged the Court to withdraw its October 12th Opinion to avoid creating such a precedent.[16] These attorneys further criticized the Court's enlargement of this vague standard by means of a disciplinary Opinion, without the Court's usual notice and rule making hearings.

On July 5, 1984, the Kentucky Supreme Court denied the Petition for Rehearing and modified, but did not change the essence of, its October 12th Opinion. Despite the KBA's request, the Court again declined to find Petitioner guilty of any of the rule violations alleged in the Charge or Board's Opinion. It still based Petitioner's suspension solely upon the substituted ground — its ex post facto determination that his "participation" in the loan transaction amounted to "unprofessional or unethical conduct."[17] However, in modifying its October 12th Opinion, the Court redefined Petitioner's offending "participation" by listing two other largely ministerial acts, evidently in order to answer the Petition for Rehearing by

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15. See KBA Response, Appendix at 78a, 80a.

16. Appendix at 90a-116a.

17. The Kentucky Supreme Court, in modifying its October 12th Opinion, added, apparently as an afterthought, the following sentences *after* concluding that Petitioner's mere "participation" in the loan transaction was "unethical" conduct warranting suspension:

> The contractual right of respondent to prevent disbursement of amounts in excess of $1,000 on behalf of REBSCS (the borrowing

(continued on page 11)

(footnote 17, continued from page 10)

> corporation) imposed a responsibility on respondent to see that disbursements were in accordance with his statement to Nath that the loan, with the exception of $10,000 to Towles to repay for personal expenses, was to be used exclusively for promotional purposes. So far as we can tell from the record, none of the loan was used for promotional purposes. July 5th Opinion, Appendix at 6a-7a.

However, if the Court intended this comment to serve as an additional "justification" for Petitioner's suspension, it did not make its intentions clear.

Nevertheless, this new statement *could not* properly serve as a basis for Petitioner's suspension, because *at no prior time* in these proceedings had Petitioner been charged with violation of a duty to insure a particular disbursement of the loan proceeds. This *new* "issue" had never been raised, or addressed, at any point in the proceedings, prior to the Court's July 5th Opinion. The *only* reference, in the Charge, to Petitioner's statement to Nath, concerning Towle's planned use of the loan proceeds, was made in the Tribunal's allegation that Petitioner had failed to disclose to Nath that Towles had earlier informed him that $10,000 would be used for reimbursement. See Charge, Appendix at 43a-44a. The Court, however, apparently conceding that this disclosure had been made, dismissed it as being "beside the point." July 5th Opinion, Appendix at 6a. Had this new issue been previously known, it would have certainly been effectively disputed, both legally and factually. For example, the following facts, *inter alia*, could have been argued to the Court:

a.) Petitioner had no custody of, or right to sign, checks on the borrowing corporation's account, and had never been in actual or constructive receipt of any of the loan proceeds;

b.) Shortly after the transaction, Towles moved to a location unknown to Petitioner, taking all checkbooks and banking records;

c.) Towles never informed Petitioner of his use or expenditure of the loan proceeds (in direct violation of his agreement with Petitioner, and rendering his "contractual right" meaningless);

d.) Nath stated that he had no knowledge that Petitioner had such a right, and therefore could not have relied on it in making the loan; and,

e.) The loan proceeds (with the exception of a $5,000.00 loan to a corporation in which Nath was a shareholder) were in fact used by Towles (for advertising, direct mail solitication, travel

(continued on page 12)

demonstrating that his "participation" consisted of more than just one isolated act.[18] Even then the Kentucky Court found that Petitioner had done no more than:

(1) Prepare and file the articles of incorporation of the corporation which made the loan;[19]
(2) Open a bank account for the lending corporation, with funds supplied by Nath; and
(3) Write the check whereby the loan was made.[20]

(footnote 17, continued from page 11)

expenses, etc., all in fact promotional expenses of the borrowing corporation.

Perhaps it is because of these facts that this *new* "issue" had never been previously raised in this proceeding.

If the Court's statement could be deemed to serve as an additional justification for Petitioner's suspension, then the Court has *again* substituted a new charge against Petitioner, in violation of procedural due process principles set forth by this Court in *In re Ruffalo*, 390 U.S. 544 (1968). See discussion on pp. 13-20, infra.

18. See July 5th Opinion, Appendix at 4a.

19. Although it may be argued that preparing articles of incorporation is not entirely ministerial, the Kentucky Court did *not* find the formation of this corporation to be evidence that Petitioner represented Nath in the loan transaction. See n. 11, *supra* at pp. 6-7.

20. The Court did not dispute the fact that all of these acts were performed at the request of Nath (the sole shareholder of the lending corporation) and with his full knowledge and consent. Further, the Court did *not* find, in either Opinion, that Petitioner had misrepresented any facts to Nath; failed to disclose his relationship with the borrowing corporation; or converted, received, or personally benefited from, any of the loan proceeds. On the contrary, the Kentucky Court, apparently conceding that Nath knew of Petitioner's relationship with the borrowing corporation, and Towles' planned reimbursement, continued to hold that such knowledge was "beside the point." Likewise, the Kentucky Court persisted in dismissing as a "non-defense" the facts that Petitioner had advised Nath to seek independent counsel, and refused to represent Nath or his corporation in their dealings with the borrowing corporation. See Annotated July 5th Opinion, Appendix at 135a, 136a.

But whether Petitioner's "participation" in the loan transaction consisted of one or three innocuous acts, these acts had *never* before been declared to be "unethical," nor complained of, charged, prosecuted, tried, briefed, considered, or defended against at any prior stage in the proceedings.

In modifying its Opinion, the Court took no action to rectify the denial of due process that resulted from its unforeseeable disposition of Petitioner's case. Although the Kentucky Supreme Court never addressed or even acknowledged Petitioner's due process claims in its modified Opinion, the Court necessarily rejected those claims when it denied, without hearing, his petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. THE KENTUCKY SUPREME COURT'S SUSPENSION OF PETITIONER FROM THE PRACTICE OF LAW, *WITHOUT PRIOR NOTICE OR HEARING*, FOR CONDUCT *OTHER THAN* THAT ALLEGED IN THE CHARGE UPON WHICH HE HAD BEEN TRIED, VIOLATED PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS.

The facts of this case clearly demonstrate that the Kentucky Supreme Court, unable to find Petitioner guilty of any of the allegations specified in the Charge upon which he had been tried, *substituted a new charge* and, upon that new charge *alone*, summarily suspended Petitioner from the practice of law. Bypassing the Inquiry Tribunal, Trial Commissioner, and Board of Governors, the Court ignored its own established disciplinary procedures, and effectively assumed the roles of initiator, investigator, prosecutor, and final judge of this new charge. The Kentucky Court's error, however, involved more than simply a violation of its own rules. Separation of these roles is a fundamental part

of our entire system of justice. As Mr. Justice Rutledge observed:

> This aggregation of powers and inherently concomitant denial of historic freedoms . . . . *are altogether at variance with our tradition and system of government. They cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property. In re Oliver*, 333 U.S. 257, 278-79 (1948), (concurring opinion) (emphasis added).[21]

Moreover, by formulating, substituting, considering and deciding this new charge, all within the privacy of its final deliberations, the Kentucky Court effectively transformed its review of this case into a type of "secret trial" which this Court denounced in *Oliver* as "a menace to liberty" and "a denial of due process of law."[22] Further, as Mr. Justice Frankfurter stated in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951):

> *Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.* No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it. Id.* at 171-72 (concurring opinion) (emphasis added).

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21. Even if the Court had not usurped these roles, such a prohibited aggregation of powers remains inherent in Kentucky disciplinary procedures. The Inquiry Tribunal is appointed by the Chief Justice of the Court; and, the Trial Commissioner and prosecuting attorney are both appointed by the Chairman of the KBA, which is itself responsible for enforcing the Court's ethical rules. All are agents of the Court. See n. 3, p. 3. It would be naive to think that the natural and expected deference of each to the other does not effectively decrease the prospect of a truly impartial and even-handed hearing, which only independent entities can insure.

22. *Id.* at 269, 273.

Yet secrecy permeates the entire disciplinary process in Kentucky. Notwithstanding the fact that under Rule 3.300 Petitioner is "to be afforded full opportunity to . . . defend himself by the introduction of evidence . . . ," that "opportunity" is made much less meaningful by Rule 3.150(1), which mandates that "*(n)othing* connected with a disciplinary case shall be made public unless so ordered by the Court (emphasis added)." Under that Rule, Petitioner and others were *not* free to openly discuss this case, *until its final disposition resulted in a published disciplinary sanction.* Ostensibly aimed at "protecting" the attorney, this rule in fact seriously restrains preparation of his defense, by indirectly restricting Petitioner's access to witnesses and proof. This Court imposed secrecy, at all stages of the proceedings, in operation severely restricted Petitioner's due process right to procure and produce evidence in his defense. This fact can be no more clearly demonstrated than by the late appearance of *Amicus Curiae* in this case. Their arguments and proof in support of Petitioner, came at an *ineffective*, if not meaningless, time in the proceedings because the secrecy of this proceeding prevented their knowledge of the case, until *after* the Court's decision had been published.

Prior to the Court's October 12th Opinion suspending him, Petitioner had been given *no notice* that the propriety of his mere "participation" in the loan transaction would be questioned, much less considered and condemned, by the Kentucky Supreme Court. Certainly the allegations of misrepresentation,[23] representing conflicting interests,

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23. Although, in both Opinions, the Court made the following suppositious statement: "It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty," the Court never found misrepresentation.

(continued on page 16)

failure to disclose, and neglect, specified in the original Charge, gave no notice of this issue; and *only these allegations* were announced, prepared for, and tried, in compliance with the Court's adopted Rules. Having found Petitioner guilty of these allegations, the Board's Opinion *cannot* be read to condemn his mere "participation" in a lawful loan transaction, *in the absence of* misrepresentation, failure to disclose, neglect and other "wrongdoing." Yet, mere "participation" in that transaction was the *sole* ground upon which the Court suspended Petitioner.

Petitioner was thereby denied *prior notice* of the charge upon which he was ultimately suspended, and any opportunity to be heard in defense. The Kentucky Court's actions rendered Petitioner's only hearing, that hearing before the Trial Commissioner, absolutely *meaningless.* No hearing can have any meaning, *unless the issues to be tried are known at the beginning.* This point was forcefully illustrated by this Court in *In re Ruffalo,* 390 U.S. 554 (1968). In that case, the prosecuting officials of the Mahoning County Bar Association, during Ruffalo's disciplinary hearing, added a new charge against him, on the basis of their *after the fact* determination that actions which he had freely admitted were "unethical." Unlike this case, Ruffalo was at least informed of this new charge, and was granted a continuance and a hearing to contest it, *before* final judgment was passed upon him. Yet, under those less offensive

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(footnote 23, continued from page 15)

July 5th Opinion, Appendix at 6a; October 12th Opinion, Appendix at 12a. This insinuation, in both Opinions, might indicate that the Court may have speculated, without finding, that some unspecified misrepresentation occurred. Assumption of wrongdoing, however, is improper in any case, and violates due process. As this Court stated, in *In re Sawyer,* 360 U.S. 622, 628 (1959), "*Speculation cannot take over where the proofs fail.*"

circumstances, this Court refused to allow the disbarment of Ruffalo from practice in the federal courts,[24] stating:

> *Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge . . .*
>
> . . . .
>
> These are adversary proceedings of a *quasi-criminal* nature. The charge must be known *before* the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner . . . no one knows.
>
> *This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. Id.* at pp. 550-52 (citations omitted) (emphasis added).

The circumstances of this case are much more alarming than those in *Ruffalo*. Although in both cases the attorneys had *no prior notice* of the charge upon which each was disciplined, in this case (unlike *Ruffalo*) the Kentucky Supreme Court suspended Petitioner, at the very end of

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24. Although the *Ruffalo* case dealt with an attorney's suspension in the federal courts, the proceedings derived from a state court proceeding which this Court found to be lacking in procedural due process. After diligent search, we have found *no* decision holding *Ruffalo* to be inapplicable to state disciplinary proceedings. On the contrary, cases citing Ruffalo appear to uniformly hold that *Ruffalo*, mandates that procedural due process be afforded in state disciplinary proceedings, with notice and an opportunity to be heard in defense. *See e.g. Walker* v. *Supreme Court of Arkansas Comm. on Professional Conduct*, 628 S.W. 2d 552, 554-55 (Ark. 1982); *People* v. *Emeson*, 638 P. 2d 293, 294 (Colo. 1981).

the proceedings, *on a charge which had never previously been made.*[25] The Court's action was manifestly improper, for as this Court in *De Jonge* v. *Oregon*, 299 U.S. 353 (1937) observed, *(c)onviction upon a charge not made would be sheer denial of due process.*"[26]

Under Rule 3.360, the Trial Commissioner can only make advisory factual findings, and is not authorized to draw conclusions concerning guilt or innocence. Such conclusions may be drawn, in the first instance, *only* by the Board, which sits in *secret*, with only the record and briefs before it. The Rules allow Petitioner *no* appearance or hearing before the Board or the Court (the only entities em-

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25. In *Cole* v. *Arkansas*, 333 U.S. 196 (1948) this Court addressed an analogous question: whether a state court can constitutionally affirm a criminal conviction on grounds which had never before been charged or tried. In *Cole*, the defendants were charged, tried, and convicted in the trial court of violating one section of a two section criminal act. On appeal, the Arkansas Supreme Court, however, did not pass upon their contentions. It instead affirmed their convictions as though they had been tried for violating the *other* section, an offense with which they were never charged, tried or convicted. In overturning their convictions, this Court stated:

> *. . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. Id.* at 201, 202 (citations omitted) (emphasis added).

Much like *Cole*, the question of whether mere "participation" in the loan transaction alone was "unethical" had *never* been a part of the Inquiry Tribunal's Charge, nor had the question ever been raised or prosecuted by the KBA, or briefed before, tried, or considered by the Trial Commissioner or KBA Board.

26. *Id.* at 362 (emphasis added). In *De Jonge*, the defendant was convicted and sentenced for mere "assistance" in the conduct of an otherwise lawful meeting. The similarity between such "assistance" and Petitioner's mere "participation" in an otherwise lawful business transaction, is obvious.

powered to determine guilt), *and he had none.* Not surprisingly, it was during this stage of the proceedings, *after* his hearing before the Trial Commissioner that confusion, and then substitution, of charges commenced. Had Petitioner not been compelled to wait silently, but allowed to freely discuss his case, pursue evidence, and *face and be heard* by the entities responsible for considering and condemning the propriety his conduct, *before* their decisions were reached, it is doubtful that this case would be here.

The fact that the Kentucky Court "reviewed the record" and based Petitioner's suspension on his admissions in the hearing before the Trial Commissioner, does *not* alter the fact that he was denied due process of law. As this Court, in *Oliver,* stated,

> . . . knowledge acquired from the testimony of others, *or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Oliver, supra,* at 275 (emphasis added).

Subsequent briefing of this question in a petition for rehearing is *not* a substitute for a fair, prior hearing. As Mr. Justice Frankfurter, concurring in *Oliver,* observed,

> . . . an opportunity to meet a charge . . . must be a fair opportunity. It would not be fair if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting. *Id.* at 284-85.

Such basic unfairness can only be magnified, where, as in this case, the Court in which Petitioner had his first opportunity to contest the substituted charge was the very

tribunal responsible for that new charge and the adverse finding upon it.[27] The violation of procedural due process in this case is both clear and extreme.

2. THE KENTUCKY SUPREME COURT'S UNFORESEEABLE ENLARGEMENT AND RETROACTIVE APPLICATION OF A VAGUE DISCIPLINARY STANDARD TO SUSPEND PETITIONER FROM THE PRACTICE OF LAW, FOR CONDUCT NEVER PREVIOUSLY CONSIDERED TO BE "UNETHICAL," VIOLATED PETITIONER'S RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

In addition to prior notice of the charge, due process demands that Petitioner have had some reasonable, prior notice, *at the time he "participated" in the loan transaction*, that the conduct for which he was ultimately suspended could be considered a violation of the Kentucky Court's ethical rules. As Justices White and Marshall, concurring in *Ruffalo*,[28] stated:

> A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls

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27. This Court in *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), stated: "A fundamental requirement of due process is 'the opportunity to be heard' . . . which must be granted at a *meaningful time* and *in a meaningful manner*" (citation omitted) (emphasis added). After the Kentucky Court's October 12th Opinion, Petitioner was faced with the task of overcoming an adverse Opinion, and *not* a first consideration of this issue by an impartial body, to which he was constitutionally entitled. To require Petitioner to overcome this adverse Opinion, would shift the burden to him to prove his innocence, and would be constitutionally impermissible. As this Court observed "*. . . it is plain that where the burden of proof lies may be decisive of the outcome.*" *Id.* at 551 (citations omitted). See also *Addington* v. *Texas*, 441 U.S. 418 (1979).

28. Although *Ruffalo* was a federal disbarment proceeding, this principle should apply with equal force to state court disciplinary proceedings, and lesser degrees of discipline. See n. 24, *supra* at p. 17.

> can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. *Id.* at 554.

In this case, *Petitioner had no such notice.* Prior to the Kentucky Court's Opinions in this case, a Kentucky lawyer, who found himself (as Petitioner did in this case) between two clients who intended to transact business together, could properly rely upon the ethical guidance set forth in Canon 5 of the Code of Professional Responsibility of the American Bar Association, as amended August 1978,[29] and the Kentucky Court's advisory opinions.[30] An attorney can comply with those guidelines in two different ways:

1. Advise the client of the conflict of interest, refuse to represent him in the particular transaction, and suggest that he secure separate counsel; or,
2. Advise the client of the conflict of interest, the advisability of securing separate counsel, and proceed to perform any legal services only after such disclosure to and consent by the client.[31]

In this case Petitioner followed the first course; and, his subsequent "participation" in the loan transaction, although not constituting "representation" of either of the parties, was nevertheless preceded by full disclosure to and

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29. Adopted by the Court, in SCR 3.130(1), as ". . . a sound statement of the standards of professional conduct required of members of the bar . . . ."

30. See *In re Advisory Opinion of Kentucky Bar Ass'n*, 526 S.W.2d 306, 307 (Ky. 1974); and, *In re Advisory Opinion of Kentucky State Bar Ass'n*, 361 S.W. 2d 111 (Ky. 1962).

31. See Amicus Brief, Appendix at 94a-102a.

consent by both. Petitioner's actions therefore completely complied with all applicable disciplinary rules of the Kentucky Court which had been announced at that time.

Consequently, Petitioner had *no prior warning* that the Kentucky Court would declare his mere "participation" in the loan transaction to be "unprofessional or unethical conduct." The Court's enlargement of that vague standard to retroactively condemn Petitioner's conduct was completely *unforeseeable*. Significantly, the Kentucky Supreme Court (in both Opinions) stated that Petitioner's case was "one of first impression in this Commonwealth."[32] The Kentucky Supreme Court thereby effectively admitted that, until its October 12th Opinion, Kentucky attorneys had no prior notice, from any case law, ethical opinion, or rule of the Court, that mere "participation" in a loan transaction could serve as grounds for a disciplinary suspension.[33]

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32. See October 12th Opinion, Appendix at 12a; July 5th Opinion, Appendix at 6a.

33. Although the Kentucky Court did not adopt the KBA Board's findings of fact and conclusions of law, the circumstances of this case suggest that the Court may have been misled by the KBA Board's Opinion. Having found Petitioner guilty of the allegations specified in the Inquiry Tribunal's Charge, the Board went on to state that it is "*almost*" *per se* unethical for an attorney ". . . to entangle his personal and financial affairs with those of his client . . . ." Board's Opinion, Appendix at 21a. Misapplying principles drawn from civil actions, in which the issue was whether or not an attorney would be deprived of the benefit of the bargain, the KBA Board speculated that *all* business dealings between attorneys and clients may be ethically suspect. However, the Kentucky Supreme Court had *never previously* indicated, in any manner whatsoever, that the mere fact of attorney-client business dealings, without some finding of "wrongdoing", would be considered a violation of an attorney's ethical duties for disciplinary purposes. Even the Board, in its Opinion, stopped short of this, by qualifying its pronouncement with the word "*almost*," and by thereupon relating back to

(continued on page 23)

This lack of prior notice is further demonstrated by the objections of Amicus Curiae to the Kentucky Court's characterization of such conduct as "unethical," and protesting its apparent rejection of the "disclosure and consent" procedure previously relied upon by Kentucky attorneys in similar circumstances. Their position was that Petitioner's conduct was not "unethical" or "unprofessional," but complied completely with the Court's current disciplinary rules, as understood by practicing attorneys in Kentucky.[34] Their appearance and arguments in this case are the clearest possible proof that, at the time of his "participation" in the loan transaction, Petitioner had *no prior notice* that his conduct could be considered a violation of the Kentucky Court's disciplinary rules.

The Kentucky Supreme Court should not be allowed to exploit the inherent ambiguity of its "unprofessional and unethical conduct" standard, in order to justify an unforeseeable expansion of that very standard. To be constitutionally permissible, this standard, *as applied*, must give effective prior notice as to what conduct is proscribed. In their concurrence in *Ruffalo*, Justices Marshall and White examined this vague standard and concluded that:

> Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally con-

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(footnote 33, continued from page 22)

other "wrongdoing" — failure to disclose, failure to document, etc., i.e. violations of the rules which it had previously specified. Board's Opinion, Appendix at 16a, 22a. The Court's condemnation of mere "participation," without finding any "wrongdoing," could *not have been anticipated.*

34. See Brief Amicus Curiae, Appendix at 92a-105a.

> demned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as *malum in se*. It also includes conduct *which all responsible attorneys would recognize as improper* for a member of the profession.
>
> . . . The appraisal of Petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question. I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession *on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct*. *Id.* at 555-56. (emphasis added).

Petitioner's "participation" in the loan transaction was not conduct "*malum in se*"; and, it was obviously not conduct "which all responsible attorneys would recognize as improper." In this case responsible attorneys not only differed in appraising the propriety of Petitioner's conduct, they felt compelled to speak out in his defense. By giving *no fair warning*[35] of the conduct which would be condemned, the vague "unprofessional and unethical conduct" standard, *as retroactively enlarged and applied* by the Kentucky Supreme Court in this case, violated Petitioner's right to due process.

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35. In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), this Court struck down a retroactive judicial expansion of a narrow, trespassing statute, stating:

> The constitutional requirement of definiteness is violated by a criminal statute *that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden* . . . . There can be no doubt that a deprivation of the *right to fair warning* can result not only from vague statutory language but also from *an unforseeable and retroactive judicial expansion* of narrow and precise language. *Id.* at 351-52. (emphasis added).

(continued on page 25)

3. TO BE TRULY MEANINGFUL THE RIGHT TO DUE PROCESS COMPELS THIS COURT'S REVIEW WHEN, IN BAR DISCIPLINARY PROCEEDINGS, VIOLATIONS OF DUE PROCESS BY A STATE'S HIGHEST COURT LEAVE NO OTHER FORUM IN WHICH TO VINDICATE THIS RIGHT.

The denial of due process in this case is unusual, because it resulted from the anomalous actions of the Kentucky Supreme Court itself. Consequently, Petitioner was left with nowhere else to turn but to this Court for justice. In *Thompson* v. *The City of Louisville*, 362 U.S. 199 (1960), this Court faced an analogous situation. In that case, Thompson appealed to this Court from a police court fine of $10. Since, at that time, police court fines of less than $20 were not appealable or otherwise reviewable in any other Kentucky court, this Court, observing that Thompson's ". . . substantive right to due process is of no avail to him *unless this Court grants him the ancillary right whereby he may test the same in the Supreme Court,*"[36] granted certiorari and reversed Thompson's conviction.

(footnote 35, continued from page 24)

Stating that such ". . . an unforseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . ," this Court further held that "(i)f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54. The Kentucky Court's enlargement and retroactive application of the "unprofessional or unethical conduct" standard to suspend Petitioner likewise operated precisely like an ex post facto law.

Even though *Bouie* involved a state court's unforeseeable enlargement of a narrow criminal statute, and not a vague disciplinary standard, the principles for which *Bouie* stands should be equally applicable in this case. Further, despite the original vagueness of the standard which the Court enlarged in this case, such an enlargement was still completely *unforseeable*.

36. *Id.* at 203 (quoting Kentucky Supreme Court).

Although the due process questions presented in this case are clearly as substantial as in *Thompson*, the consequences of the Kentucky Supreme Court's denial of Petitioner's right to due process are *much more severe*. The devastating effect of an adverse disciplinary decision has been vividly described by Mr. Justice Black:

> . . . Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. . . . And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land," both constitutional and statutory.
>
> In view of all this, I can see no justification for the notion that membership in the bar is a mere privilege conferred by the State and is therefore subject to withdrawal for the "breach" of whatever vague and indefinite "duties" the courts and other lawyers may see fit to impose on a case-by-case basis. *Cohen* v. *Hurley*, 366 U.S. 117, 147 (1961) (dissenting Opinion) (overruled in *Spevak* v. *Klein*, 385 U.S. 500 (1967).

The question presented in this case is essentially whether the right to due process compels this Court's review, when the highest court of a state, in regulating its bar, violates fundamental principles of due process to suspend an attorney from the practice of law. Although at this late time one would reasonably expect there to be no serious question that state court disciplinary proceedings must afford procedural and substantive due process,

Counsel have found *no* case in which this Court has directly faced and answered these questions.[37]

In *Selling* v. *Radford*, 243 U.S. 46 (1971), *Theard* v. *United States*, 354 U.S. 278 (1957), and *Ruffalo, supra*, this Court has held that state court disciplinary decisions are not binding upon, and will not be honored by, this Court for purposes of determining whether an attorney shall retain membership in the federal bar, if "the state procedure, from want of notice or opportunity to be heard, was wanting in due process. . . ."[38] However, in each of these cases, the underlying state court decisions were allowed to stand. Those inconsistent results may well have been due to the presence in those state decisions of other adequate state grounds forming the basis of the discipline imposed.[39] In Petitioner's case, however, this defect does not exist. In each of two Opinions, the Kentucky Supreme Court based Petitioner's suspension only upon *one* ground - the charge which it improperly substituted, without notice and hearing.

The denial of due process in this case is certainly similar to *Ruffalo*, but much more grievous. Although in

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37. Recently, in *In re Primus*, 436 U.S. 412 (1978) lack of fair notice of the charges was claimed, and *Ruffalo* invoked, but this Court declined the opportunity to address these questions, and overturned the state court's disciplinary decision on First Amendment grounds. *Id.* at 428, n. 13.

38. *Selling, supra* at 51.

39. In *Ruffalo* for example, this Court apparently did not feel that Ruffalo's disbarment in the state court presented a suitable vehicle for consideration of this issue. This may have been due to the fact that *in addition to* the newly added charge concerning the employment of Orlando, the Ohio Supreme Court based Ruffalo's suspension on a finding that by loaning money to clients he had impermissably purchased on an interest in their litigation — *an offense contained in the original charges against him*. See *Mahoning County Bar Ass'n* v. *Ruffalo*, 199 N.E. 2d, 396, 401 (Ohio 1964), cert. denied 379 U.S. 391 (1964).

that case, this Court dealt only with Ruffalo's right to remain admitted to the federal bar, the principles enunciated by this Court must surely have application to state disciplinary proceedings as well. The Kentucky Supreme Court, out of step with other state courts which have considered *Ruffalo*, apparently is of the opinion that *Ruffalo* is not binding authority in state disciplinary proceedings.[40] Petitioner urges this Court to *directly hold* that the principles of due process announced in *Ruffalo* do apply to state disciplinary proceedings, and that these proceedings are *not* an exception to the rule.

If, as this Court stated in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), "(a) State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment . . . ,"[41] then a state court should not be allowed to suspend an attorney from practicing his profession *without* affording him procedural and substantive due process. Surely the right of an attorney to continue to practice a profession upon which he has come to depend, is greater than the mere expectation of becoming an attorney, which this Court protected in *Schware*. If this Court, on due process grounds, has felt compelled to reverse state court decisions in the first instance,[42] this Court should also feel compelled to do no less in this case.

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40. Although *Ruffalo* was extensively cited to the Kentucky Supreme Court as a bar to its actions in this case, the Court nevertheless rejected *Ruffalo*, by denying the Petition for Rehearing without comment. See Petition for Rehearing, Appendix at 65a-69a; see also n. 24, *supra* at p. 17.

41. *Id.* at 238-39.

42. See also *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957).

Petitioner recognizes that ordinarily certiorari is not granted where a petitioner has had an appeal in which his federal claim could have been raised earlier, but raised that claim only in a petition for rehearing. In this case, Petitioner had *no* appeal from the Kentucky Supreme Court's unanticipated disposition of his case, and *no prior opportunity* to present his due process claim. His claim was therefore timely made "*since it was raised at the first opportunity.*" *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930). As this Court stated in *Saunders* v. *Shaw*, 244 U.S. 317 (1917),

> *. . . when the act complained of is the act of the (state) supreme court, done unexpectedly at the end of the proceeding, . . . it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. Id.* at 320 (emphasis added).

Just as in *Thompson*, where no appeal lay from the action of the Louisville police court, Petitioner likewise has no right of appeal or review, unless this Court grants Certiorari.

CONCLUSION

The power of a state Court to remove or suspend members of its bar is *not* absolute. It must be limited by those guarantees of due process and basic fairness upon which our entire system of justice is founded. The Kentucky Supreme Court's anomalous actions in this case violated the most fundamental conceptions of due process and are *inherently wrong*. When the highest Court of a state, itself, is originally responsible for violating these

rights, it is crucial that this Court be willing to intercede. *Without a forum in which these precious rights can be defended, they cannot truly be said to exist.*

For these reasons Petitioner respectfully prays that this Court will issue a Writ of Certiorari to review the final Opinion of the Kentucky Supreme Court.

Respectfully submitted,

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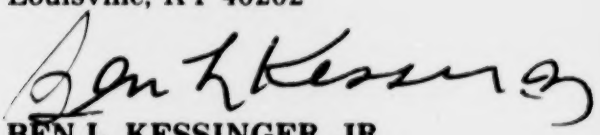

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APPENDIX

RECEIVED JUL 1984

SUPREME COURT OF KENTUCKY

No. 83-SC-144-KB

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V. **IN SUPREME COURT**

ERIC S. SMITH — RESPONDENT

ORDER DENYING PETITION FOR REHEARING

Respondent's petition for rehearing is denied. The opinion rendered October 12, 1983, is modified on its face and is attached hereto.

All concur except Stephens, C.J., who did not sit.

ENTERED: July 5, 1984.

/s/ J. Calvin Aker
Deputy Chief Justice

* * * * * * * *

RENDERED: October 12, 1983
AS MODIFIED: July 5, 1984
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
No. 83-SC-144-KB

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V. **IN SUPREME COURT**

ERIC S. SMITH — RESPONDENT

OPINION OF THE COURT

This is a disciplinary case in which respondent was charged with unethical and unprofessional conduct. The Board of Governors of the Kentucky Bar Association found respondent guilty of unethical and unprofessional conduct and recommended that he be suspended from the practice of law for a period of eighteen months.

We have made an independent review of the record, the transcript and considered the briefs and arguments of the parties. We adopt the decision of the Board of Governors.

Respondent represented a Dr. Nath who paid him a retainer and employed respondent to organize a corporation to take care of some other interests of Nath. Respondent was paid a retainer by this corporation. Dr. Nath frequently consulted with respondent and visited his office frequently. It was in respondent's of-

fice that Dr. Nath met Towles and thus began the scenario that ended in this disciplinary proceeding.

Respondent became acquainted with Towles and organized a corporation for him, REBSCS (Real Estate Buyers and Sellers Consultant Services). Towles was attempting to organize and sell a system whereby private individuals could be instructed on how to buy and sell options on real estate and be members of a referral network within which a person who procured an option could communicate with others who might know of a buyer and arrange the sale of the option for a fee. Respondent performed the legal work with an agreement that Towles would pay respondent an attorney fee of five percent (5%) of the gross earnings of the business plus the option to purchase five percent (5%) equity in the business. In addition, respondent received the right to inspect the books of the corporation, to prevent its sale of stock, reorganization, or disbursement of any amounts in excess of $1,000 without written consent of respondent.

Respondent spent substantial time on the enterprise, designing a computer network linking franchised realtors with each other and with private real estate investors. In view of the amount of services performed by respondent, an addendum to the agreement was executed providing respondent with an option to acquire from Towles a number of shares of capital stock as shall equal twenty-five percent (25%) of all outstanding shares of REBSCS Inc's stock.

Respondent permitted Towles to use a vacant office in his building to work on REBSCS related matters, use of secretarial help and telephone.

It was there that Dr. Nath first saw Towles, and after inqury about the business and being on the lookout for business deals, Dr. Nath became interested. The upshot was that Dr. Nath, through a newly organized corporation, made an unsecured loan to REBSCS. Within four weeks, due to personal problems experienced by Towles, REBSCS became moribund, and Dr. Nath lost any hope of the loan being repaid. At the time of the complaint against respondent, REBSCS had a minimal bank balance.

It is in the events leading up to the loan that the Kentucky Bar Association has charged respondent with unethical and unprofessional conduct.

We do not attempt to unravel all the contradictory testimony regarding what Dr. Nath testified respondent said and did in order to persuade Dr. Nath to invest in REBSCS and what respondent testified that he said and did in denial.

It is uncontradicted that Nath Holdings was formed by respondent on February 13, 1980, and the certificate of incorporation was issued on February 13, 1980. Nath gave respondent a check for $30,200 on the same day and a bank account for the corporation was opened by respondent. Respondent was registered agent for service of process and used his office as mailing address for the corporation. Whether

or not Nath Holdings was set up for the purpose of making the investment or loan, the timing leads to that inference.

When the meeting consumating the transaction took place, respondent had prepared a check on Nath Holdings made to REBSCS in the amount of $30,000 as a loan in exchange for convertible debenture with conversion within five years into an amount equal to ten percent (10%) of the total shares in REBSCS.

This check was voided at the request of Dr. Nath, and respondent prepared another check marked "loan." There was no security or promissory note. Nath testified respondent told him all that would be taken care of later. Respondent denied this and testified he could not under the circumstances perform any service for REBSCS. In any event, REBSCS received the check. On that date REBSCS had a bank balance of $73.31. This money was quickly dispensed, first $10,000 to Towles to repay for expenses and later $5,500 to Towles to repay for expenses. The bank balance of REBSCS shortly was reduced to about $41.

Respondent's defense that it was not established that he represented Dr. Nath in this transaction is a non-defense.

Respondent had performed all the legal work for REBSCS and he owned a contingency interest in REBSCS. Respondent's office address was used as a mailing address for REBSCS. Respondent also represented Dr. Nath and one of his corporations

generally. We consider Nath Holdings as an extension of Dr. Nath personally.

Whether Dr. Nath knew that respondent owned an interest in REBSCS and whether Dr. Nath knew that Towles planned to reimburse himself for $10,000 in expenses after the loan are beside the point.

Respondent engaged in these activities culminating in preparing a check and, to that extent, participated in a transaction whereby one client lent money to a corporation in which respondent had a substantial interest. A lawyer simply cannot defend against a charge of unethical and unprofessional conduct in such a scenario. In placing himself in this position, respondent incurs the penalty imposed as recommended by the Kentucky Board of Bar Governors to this court. It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty.

This situation is one of first impression in this Commonwealth and should illustrate that we are committed to the proposition that, in financial dealings with a client, a lawyer must exercise the utmost good faith and fidelity to a client and not place himself or herself in a position of participating in a transaction, such as here, so as to bring the bench and bar into disrepute. The unethical and unprofessional conduct here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of respondent. The contractual right of respondent to

prevent disbursement of amounts in excess of $1,000 on behalf of REBSCS imposed a responsibility on respondent to see that disbursements were in accordance with his statement to Nath that the loan, with the exception of $10,000 to Towles to repay for personal expenses, was to be used exclusively for promotional purposes. So far as we can tell from the record, none of the loan was used for promotional purposes.

Accordingly, it is ordered that respondent be suspended from the practice of law in this Commonwealth for a period of eighteen months and that he inform his clients in compliance with SCR 3.390, and pay the costs of this proceeding.

All concur except Stephens, C.J., who did not sit.

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RENDERED: October 12, 1983
To Be Published

SUPREME COURT OF KENTUCKY
83-SC-144-KB

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V. — ORIGINAL ACTION IN SUPREME COURT

ERIC S. SMITH — RESPONDENT

OPINION OF THE COURT

This is a disciplinary case in which respondent was charged with unethical and unprofessional conduct. The Board of Governors of the Kentucky Bar Association found respondent guilty of unethical and unprofessional conduct and recommended that he be suspended from the practice of law for a period of eighteen months.

We have made an independent review of the record, the transcript and considered the briefs and arguments of the parties. We adopt the decision of the Board of Governors.

Respondent represented a Dr. Nath who paid him a retainer and employed respondent to organize a corporation to take care of some other interests of Nath. Respondent was paid a retainer by this corporation. Dr. Nath frequently consulted with respondent and

visited his office frequently. It was in respondent's office that Dr. Nath met Towles and thus began the scenario that ended in this disciplinary proceeding.

Respondent became acquainted with Towles and organized a corporation for him, REBSCS (Real Estate Buyers and Sellers Consultant Services). Towles was attempting to organize and sell a system whereby private individuals could be instructed on how to buy and sell options on real estate and be members of a referral network within which a person who procured an option could communicate with others who might know of a buyer and arrange the sale of the option for a fee. Respondent performed the legal work with an agreement that Towles would pay respondent an attorney fee of 5 percent of the gross earnings of the business plus the option to purchase 5 percent equity in the business. In addition, respondent received the right to inspect the books of the corporation, to prevent its sale of stock, reorganization, or disbursement of any amounts in excess of $1,000 without written consent of respondent.

Respondent spent substantial time on the enterprise, designing a computer network linking franchised realtors with each other and with private real estate investors. In view of the amount of services performed by respondent, an addendum to the agreement was executed providing respondent with an option to acquire an additional 20 percent of REBSCS Inc.'s stock.

Respondent permitted Towles to use a vacant office in his building to work on REBSCS related matters.

It was there that Dr. Nath first saw Towles, and after inquiry about the business and being on the lookout for business deals, Dr. Nath became interested. The upshot was that Dr. Nath made an unsecured loan to REBSCS. Later on, due to personal problems experienced by Towles, REBSCS became moribund, and Dr. Nath lost any hope of the loan being repaid. At the time of the complaint against respondent, REBSCS had a minimal bank balance.

It is in the events leading up to the loan that the Kentucky Bar Association has charged respondent with unethical and unprofessional conduct.

We do not attempt to unravel all the contradictory testimony regarding what Dr. Nath testified respondent said and did and what respondent testified that he said and did.

It is uncontradicted that respondent prepared the check in the sum of $30,000 representing a loan from Dr. Nath to REBSCS. This money was quickly dispensed, first $10,000 to Towles to repay for expenses and later $5,500 to Towles to repay for expenses. The bank balance of REBSCS shortly was reduced to about $41. There was no security.

Respondent's defense that it was not established that he represented Dr. Nath in this transaction is a non-defense.

Respondent represented Towles and REBSCS generally; he owned an interest in REBSCS. Respondent also represented Dr. Nath and his corporations generally.

Whether Dr. Nath knew that respondent owned an interest in REBSCS or not and whether Dr. Nath knew that Towles planned to reimburse himself for $10,000 in expenses after the loan is beside the point.

Respondent prepared a check, and to that extent participated in a transaction whereby one client lent money to another of respondent's clients, a corporation in which respondent had an interest. A lawyer simply cannot sustain a plea of no conflict of interest in such a scenario. In placing himself in this position, respondent incurs the penalty imposed as recommended by the Kentucky Board of Bar Governors to this court. It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty.

This situation is one of first impression in this Commonwealth and should illustrate that we are committed to the proposition that in financial dealings with a client, a lawyer must exercise the utmost good faith and fidelity to a client and not place himself or herself in position of conflict of interest such as to bring the bench and bar into disrepute. The display of poor judgment here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of respondent.

Accordingly it is ordered that respondent be suspended from the practice of law in this Commonwealth for a period of eighteen months and that he inform his clients in compliance with SCR 3.390 and pay the costs of this proceeding.

Aker, Gant, Leibson, Stephenson, Vance and Wintersheimer, JJ., sitting; all concur. Stephens, C.J., not sitting.

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RECEIVED JAN 3 1983
KY BAR ASSN.

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION — COMPLAINANT

v. **OPINION OF THE BOARD OF GOVERNORS**

ERIC S. SMITH — RESPONDENT

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The charges against the Respondent Eric S. Smith, simply stated and summarized, are that Smith grossly violated his fiduciary duty to one client, Harendra Nath, in order to advance the interests of another client, Charles Towles, as well as Smith's own interests.

Although sharply disputed by the Respondent, the Board of Governors accepts the "Statement of Findings of Fact" incorporated in the Trial Commissioner's Report, which the Board finds to be complete, authoritative, and dispositive of the material factual issues in the case.

Smith clearly had an attorney-client relationship with Dr. Nath up through and including the time of the transaction in question, and beyond. At substantially the same time, certainly as of the transaction, Smith also had an attorney-client relationship with Charles Towles and Towles' corporation, Real Estate

Buyers and Sellers Consultant Service, Inc. [REBSCS]. In fact, the method of compensation of Smith from the Towles/REBSCS representation was a percentage of ownership of the business, which circumstance gave Smith a decided personal stake in the viability of REBSCS.

The evidence is overwhelmingly persuasive that REBSCS was a failing business, and that Dr. Nath's infusion of $30,000 into the business was necessary if it was not to fail altogether. Irrespective of who initiated Nath's investment, Smith put Nath into a transaction which benefited another client, Towles and REBSCS - and Smith himself - to Nath's disadvantage. The transaction is remarkable for the haste of its accomplishment, which left Nath unprotected by even so much as a promissory note, to say nothing of any other usual form of security which a prudent, independent lawyer would seek, if not demand for his client.

The fact that there was apparent misunderstanding all around as to the nature of the transaction involving Nath's investment, as was found by the Trial Commissioner, further underscores Smith's lack of attention to Nath's interests.

While Smith apparently advised Nath to obtain other counsel because of a potential conflict in connection with the transaction, Smith nonetheless proceeded forward with the transaction which unquestionably advanced Towles' and REBSCS's interests, as well as his own, at the expense of Nath. The Board

of Governors deems Respondent's arguments to the effect that Smith thereby owed no duty to Nath in connection with the transaction, to be unpersuasive and contrary to prevailing standards in Kentucky regarding the fiducial obligation of a lawyer to his client.

The Board likewise finds unpersuasive and contrary to the prevailing standard, Respondent's argument that no clear nexis was established between Smith's dereliction and Nath's injury; see *Kentucky Bar Association* v. *Roberts*, Ky., 579 S.W.2d 107 (1979).

The Board of Governors finds that Smith's conduct violated the provisions of DR 1-102 [Engaging in Deceit or Misrepresentation], DR 5-101 and 5-105 [Accepting Employment which Effects the Independence of the Lawyer or Impairs the Client's Interests] and DR 6-101 [Neglecting a Legal Matter Entrusted to the Lawyer], and that, in sum, this conduct has brought the Bench and Bar into disrepute; SCR 3.130(1).

Canon 5, American Bar Association *Model Code of Professional Responsibility* ["A Lawyer Should Exercise Independent Professional Judgment on Behalf of the Client"] deals explicitly with prohibited traps which disable the lawyer from exercising full, fair, and uncompromised professional judgment in behalf of his client.

EC 5-1 states:

> "The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely for the benefit of his client* and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." (emphasis ours)

As to a lawyer's entangling his own interests with those of his client, the Code warns:

> "A lawyer should not accept proferred employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully *should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.*" (emphasis ours)
>
> "The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proferred by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property

> interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client *nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.*" (emphasis ours)

As noted, this Canon also speaks to the problems of representing multiple clients with actual or potential differing interests. EC 5-14 states:

> "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant."

EC 5-15 continues, in pertinent part:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be

> impaired or his loyalty divided if he accepts or continues the employment."

Obviously the difficulty is compounded where, in addition to representing one or more clients, the lawyer is representing *his own* interests in any given matter, and is himself involved in the mix as a "client".

Applicable Disciplinary Rules under this Canon particularize these aspirational statements into hard rules, and *facially* seem to provide that almost anything goes, with disclosure to and consent by the clients; see DR 5-101(A), 5-104(A), and 5-105(A) and (B). As noted below, however, disclosure and consent do not in any way mitigate a lawyer's continuing fiducial obligation to the client.

Generally, as well as in Kentucky, a client is entitled to expect from his or her attorney not just competent technical performance, but *uberrima fides*, defined in *Black's Law Dictionary* [4th Edition; West, 1968] as:

> "The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception however slight . . . perfect good faith, concealing nothing . . . "

See also 7 Am.Jur.2d *Attorneys at Law* §120:

> "An attorney must faithfully, honestly, and consistently represent the interests and protect the rights of his client. He is bound to discharge his duties to his client with the strictest fidelity, to observe the highest and utmost good faith toward him, and to inform his client promptly of any known information important to him. An attorney may not withhold from his client information acquired in his capacity as an attorney (and) may not use the information to his own advantage . . ." (citations omitted)

Kentucky Courts impose, if anything, an even more rigorous standard. In *Daughterty* v. *Runner*, Ky.App. 1978, 581 S.W.2d 12, 16, the Court articulated the office of attorney as follows:

> "What is the level of service demanded from members of the legal profession? The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties. The relationship is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the Court; thus, the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal. Since the relationship of attorney-client is one fiduciary in nature, *the attorney has the duty to exercise in all his relationships with his client principal the most scrupulous honor, good faith and fidelity to his client's interests.*" (emphasis ours)

These are not just pretty words. When a lawyer's personal interests bend, or even appear to compromise a client's property or expectations, our Kentucky Courts move decisively, sometimes even harshly; see *Kentucky Bar Association* v. *Tucker*, Ky. 1975, 535 S.W.2d 97 cert. den. 423 U.S. 1049 (1976); *Kentucky Bar Association* v. *Burbank*, Ky.Sup.Ct. 1976, 539 S.W.2d 312; and *Kentucky Bar Association* v. *DeCamillis*, Ky.Sup.Ct. 1977, 547 S.W.2d 446.

Further, a lawyer's duty to his client is not limited to a passive avoidance of harmful conduct, but the lawyer is required to exert active vigilence and to take positive, sometimes unpleasant steps to protect and advance his clients' interests; see *Daugherty* v. *Runner*, supra; see also *Ray* v. *Rose* [6th Cir., 1974] 491 F.2d 285, 289 (attorney may not ". . . subordinate the rights of his client to receive fair and honest legal advice and related services to his own selfish interests"); and *Devers* v. *California* [9th Cir., 1970] 422 F.2d 1263, 1264 (". . . one of an attorney's most valuable functions (is) to persuade his client to take that course which, to the attorney, in the light of his experience, appears to be the wisest").

Kentucky Courts have consistently held that the principal of *uberrima fides* is almost *per se* inconsistent with a lawyer's entangling his personal and financial affairs with those of his client, particularly where the entanglement involves the subject of the underlying representation. There is a flat presumption that

the lawyer has overreached the client; see *Palms' Administrators* v. *Howard*, Ky. 1908, 112 S.W. 1110; *Hunt* v. *Picklesimer*, Ky. 1942, 162 S.W.2d 27; see also 7 Am.Jur.2d *Attorneys at Law* §125.

There is also a concommitent duty to disclose any fact or matter gained in the course of the representation which would be material to the client, or to his interests; see *Arrowood* v. *Lyon*, Ky. 1955, 279 S.W.2d 801, 802-03. The attorney is under a specific obligation to recognize and promptly inform the client of adverse circumstances; see *Daugherty* v. *Runner*, supra, 581 S.W.2d at 17-18.

A lawyer cannot escape this obligation by express disclaimers or reservations; *Owen* v. *Neely*, Ky. 1971, 471 S.W.2d 705.

Under some circumstances, even when the client is informed of and agrees to the lawyer's conduct involving a latent or patent conflict, the Courts simply will not condone it; see *In re: Ray*, Ky. 1965, 390 S.W.2d 899.

The standard of care required of an attorney in Kentucky, in terms of technical competence, as well as faithfulness to the client's interests, is defined as a "... degree of care and skill customarily provided by members of the legal profession"; *Daughterty* v. *Runner*, supra, 581 S.W.2d at 16.

CONCLUSION AND RECOMMENDATION

The Board of Governors by a vote of 11-0 concludes that the Respondent is guilty of unethical and unprofessional conduct tending to bring the Bench and Bar of Kentucky into disrepute.

The Board of Governors, by a vote of 10-1 believes the conduct of the Respondent Eric S. Smith warrants his suspension from the practice of law for a period of eighteen (18) months and that he be required to pay the costs of this action, and the Board so recommends to the Supreme Court of the Commonwealth of Kentucky.

The motion to reconsider was considered and overruled.

BOARD OF GOVERNORS
KENTUCKY BAR ASSOCIATION

/s/ Charles Landrum, Jr.
PRESIDENT
Feb. 12, 1983

* * * * * * * *

RECEIVED AUG 13 1982
KY. BAR ASSN.

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION, Complainant

v. REPORT OF TRIAL COMMISSIONER

ERIC S. SMITH, Respondent

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PREFACE

The charges in this action result from a complaint filed with the Kentucky Bar Association by Harendra Nath, M.D., of Lexington, Kentucky, against the Respondent, Eric S. Smith, an Attorney at Law in Lexington, Kentucky. The manner in which the Complainant has alleged charges against the Respondent is in a narrative form and not subject to a clear delineation of the charges as they apply to the disciplinary rules and, for that reason, it will be necessary to cite the disciplinary rules involved, the basic questions, as applied to the facts, on which the charges are based, and a review of the testimony which the Commissioner deems proven by substantial evidence.

STATEMENT OF CHARGES

This case arises from the following circumstances: Eric S. Smith is an attorney and had as his clients

Harendra Nath, (hereinafter "Nath"), the complaining witness, REBSCS, a Kentucky corporation, and Charles Towles (hereinafter "Towles"), President of REBSCS.

Nath loaned or invested Thirty Thousand Dollars ($30,000.00) in REBSCS and, for all practical purposes, has lost that money. The loan or investment was made on February 15, 1980, when Nath, Towles and REBSCS were all clients of Eric S. Smith.

The charges are as follows:

1. That Eric Smith represented Nath in that transaction and advised, encouraged and urged Nath to invest Thirty Thousand Dollars ($30,000.00) in REBSCS; and that Nath relied on Eric Smith's advice in consummating the transaction.

2. At the time of the transaction Smith either knew or should have known that REBSCS was in serious financial difficulty and, at no time, did Smith ever inform Nath that REBSCS was in serious financial difficulty.

3. That at no time did Smith ever fully inform Nath as to the extent of Smith's personal financial interest and control over REBSCS.

4. Smith assured Nath that Smith would prepare a promissory note and all other legal documents necessary to evidence and secure said loan of Thirty Thousand Dollars ($30,000.00), but Smith subsequently failed and neglected to prepare a promissory

note or other legal documents necessary to evidence and secure said loan.

5. At no time did Smith ever inform Nath that most of the Thirty Thousand Dollars ($30,000.00) would be used to reimburse Towles for expenses Towles had allegedly incurred in promoting REBSCS even though Smith was aware the money would be used for that purpose. Instead, Smith advised Nath the money would be used for advertising and licensing of REBSCS.

6. In response to a request by Nath to see REBSCS' checkbook, Smith falsely stated and misrepresented to Nath that Smith had no authority to review or to gain access to the financial records of REBSCS when, in fact, he had a contractual right to inspect the financial records of REBSCS.

7. Smith took no action to protect Nath's interest, and, as a result of Smith's actions described above, Smith's client, Nath, suffered a loss of approximately Thirty Thousand Dollars ($30,000.00).

STATEMENT OF DEFENSES

The Respondent, Eric S. Smith, asserted the following defenses:

1. He did not represent Nath in this transaction.

2. He did not induce Nath to invest in a corporation in which Smith had a financial interest.

3. He advised Nath of a potential conflict of interest and requested Nath to secure other counsel.

4. Nath knew of Smith's interest in the corporation.

5. Nath was aware that Towles would reimburse himself at least Ten Thousand Dollars ($10,000.00) from the investment monies which Nath gave to Towles.

6. Smith did not agree to prepare any documentation regarding the transaction between Nath and Towles.

7. Smith did not refuse to allow Nath to inspect the financial records of REBSCS, and did not tell Nath that Smith did not have the right to inspect the financial records of REBSCS.

STATEMENT OF PROCEEDINGS

This complaint was heard by the Trial Commissioner in the library of the law offices of Harbison, Kessinger, Lisle & Bush, Lexington, Kentucky, on February 16-17, 1982.

The Kentucky Bar Association was represented by counsel, Honorable Ray Corns and Honorable Michael M. Hooper. The Respondent was represented by Honorable Ben L. Kessinger, Jr.

The Complainant introduced the testimony of Harendra Nath, M.D., Susan Nath and Carol A. Eakle. The Respondent introduced the testimony of Eric Steven Smith, David Irvin, Sandra Oliver, Fred Whiteside and Charles Towles.

After the hearing was completed on the evening of February 17, 1982, the Complainant was given thirty (30) days from and after the date of filing of the Transcript of Evidence in which to file a brief. The Respondent was given thirty (30) days from that date in which to file his brief. The briefs were duly filed.

Upon submission of the briefs the action stood submitted to the Trial Commissioner for decision.

STATEMENT OF FINDINGS OF FACT

The Trial Commissioner finds the following facts have been established by substantial evidence.

The principal parties involved in this controversy are Harendra Nath, M.D. (hereinafter referred to as "Nath"); Eric S. Smith, attorney, (hereinafter referred to as "Smith"); REBSCS, Inc., a corporation formed for the purpose of franchising a real estate referral service (hereinafter referred to as "REBSCS") and Charles E. Towles of Georgetown, Kentucky, founder of REBSCS, Inc. (hereinafter referred to as "Towles").

Nath is a radiologist practicing at Lexington, Kentucky. He obtained his training in England and Canada and moved to Kentucky in 1976, (T. pp. 5-7)*.

In 1977, Nath was introduced to Smith and they entered into an attorney-client relationship. Not only was there a close attorney-client relationship but Nath and Smith also developed a close personal relation-

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*All references to the transcript of hearing shall be noted as "T. p.".

ship. Nath would not enter into any business activities or make any investments without first consulting with Smith. Nath would consult with Smith as frequently as three or four times a week and they would often have lunch together, (T. pp. 6, 8, 231, 232, 546, 547).

Smith formed a corporation for Nath: H. Nath Chartered, which was a professional service corporation. From 1978 through May of 1980, Nath paid Smith a legal retainer fee of $100.00 per month to represent Nath in his personal legal business. Nath also paid Smith an additional retainer fee of $300.00 per month to serve as counsel for H. Nath Chartered, (T. pp. 10-12, 58; Exhibit #4).

Some time in 1979, Towles, through a third party, had some business dealings with Smith. Subsequently, Smith represented Towles in a matter before the Kentucky Real Estate Commission. Towles had been obtaining options to purchase land and then selling the options for a profit. This was in violation of Kentucky law. However, Towles apparently conceived of the idea of organizing and selling a system whereby licensed individuals could buy and sell options on real estate and could also be members of a referral network which, apparently, was to be nationwide. Towles felt the idea was good and he entered into an agreement with Smith, if Smith could overcome the legal obstacles, to pay Smith a contingent attorneys fee of five percent (5%) of the gross earnings of the business, plus he gave Smith an option to purchase a five per-

cent (5%) equity interest in the business and Smith, pursuant to said agreement, formed, for Towles, the corporation known as REBSCS. Smith was to receive nothing for his services if the company was not successful, (T. pp. 244-247).

On July 2, 1979, Smith and Towles entered into an agreement (Exhibit 2) which provided, among other things, as follows:

1. Towles was to form the corporation known as REBSCS.

2. Smith was to perform all legal services for the corporation.

3. Smith was to be compensated by receiving five percent (5%) of the gross receipts of REBSCS or any subsidiary thereof for the life of the corporation. Smith was also to have an irrevocable option for a period of fifteen (15) years to purchase five percent (5%) of REBSCS capital stock for only One Hundred Dollars ($100.00). Smith had the right, at any time, to inspect all books and records of REBSCS, including bank records, and to audit REBSCS. Furthermore, REBSCS could not take any action to dissolve, to divest itself of any asset in excess of One Thousand Dollars ($1,000.00), to issue any shares of common capital stock or to issue any securities convertible into capital stock without Smith's express prior written consent.

REBSCS was formed on July 11, 1979, and the certificate of incorporation was issued by the Kentucky Secretary of State on July 17, 1979, (Exhibit 1).

There was a tremendous amount of time spent by Smith and Towles in getting the corporation established. Smith testified that he spent "hundreds of hours" and that he met with Towles almost every day and also on the weekends, (T. pp. 258, 374, 571). Smith had an empty office in his law offices and allowed Towles to use that office rent-free. Towles also had a telephone line which, apparently, ran through Smith's switchboard and used Smith's office address as the mailing address for REBSCS, (T. pp. 341-344).

Nath, who was in Smith's office frequently, noticed all of the activity and made inquiries of Smith as to the nature of the business that he was conducting with Towles. Smith apparently told Nath of the type of business he was setting up for Towles and Nath became interested in purchasing stock in REBSCS. This was, apparently, without solicitation on the part of Smith as Smith did not want any stock sold in REBSCS and advised Nath that stock was not available, (T. pp. 8, 9).

Smith was extremely enthusiastic about REBSCS and felt, with his percentage interest, it would make him a multi-millionaire. He advised Nath and others of this feeling, (T. pp. 8, 140). This enthusiastic outlook by Smith apparently whetted Nath's interest in the company and he apparently pressed Smith with a request to purchase stock. However, Smith told Nath that stock was not available (T. pp. 8, 9), but that if Towles ever decided to sell stock, Smith would so advise Nath.

Because of the inordinate amount of work which Smith was expending on behalf of Towles and REBSCS an addendum to their attorney employment agreement was made on October 31, 1979, between REBSCS, Towles and Smith (Exhibit 3).

In this addendum, Smith's potential position in REBSCS was altered as follows:

Before listing the changes it should be noted in the original employment agreement of July 2, 1979 (Exhibit 2), Smith had an option to purchase *from the corporation* (emphasis added) a number of shares of common capital stock of the corporation as shall equal five percent (5%) of all issued and outstanding common capital shares of the corporation.

In the orginal REBSCS incorporation, the corporation was authorized to issue two thousand (2,000) shares of common stock, without par value.

Towles received nine hundred (900) shares of stock in REBSCS, (Exhibit 17).

In the agreement of October, 1979, Smith obtained the option to purchase, within five (5) years from October 1, 1979, from Charles E. Towles (not from the corporation) a number of shares of capital stock "as shall equal twenty-five percent (25%) of all issued and outstanding common capital shares of REBSCS, Inc."

Further, the addendum placed restrictions on Towles' right to sell the shares of stock which had been issued to him from REBSCS, (Exhibits 3, 17).

This agreement seems to dilute Towles' interest in the corporation and increase Smith's interest in the corporation. After this addendum, Smith would have the right to purchase twenty-five percent (25%) of the shares held by Towles and to veto any sale of treasury stock of the corporation.

All other basic agreements in the original employment agreement of July 2, 1979, remained intact (Exhibit 3).

In late 1979 or early 1980, REBSCS started having financial difficulties, (T. pp. 550-552, 574, 577-578). REBSCS had the following bank balances: December, 1979, $480.67; January 14, 1980, $76.31 and February 11, 1980, $73.31, (Exhibit 7).

Sometime in December, 1979, Towles advised Smith he intended to sell stock in REBSCS so he could get Ten Thousand Dollars ($10,000.00) expenditures reimbursed, (T. p. 275). Smith advised Towles that Nath wanted to purchase stock and Towles requested Smith to contact Nath, (T. pp. 276, 277). Smith did not want Towles to sell any stock in REBSCS, (T. pp. 274, 539, 574-575).

Nath was aware that Smith had a five percent (5%) interest in REBSCS, (T. pp. 53-54). However, Nath was not aware that Smith had an option to purchase twenty-five percent (25%) of the outstanding shares of the corporation and was not aware of the amount of control that Smith could exercise over REBSCS, (T. pp. 55-56, 485).

On February 11, 1980, Smith went to the home of Nath for the purpose of explaining the REBSCS corporation to Nath's wife, (T. pp. 26-33). When Smith arrived, Nath had prepared a check to REBSCS in the amount of $30,000.00 as a ". . . loan in exchange for convertible debenture with conversion within five years from this date into an amount equal to ten percent of the total shares in REBSIS-REBSCS at that time", (Exhibit 6). Nath prepared this check on the advice of his accountant, (T. pp. 181-182).

This check was refused by Smith for the reason that it would have given Nath a direct interest in REBSCS, which would have diluted the interest of Smith in REBSCS, (T. pp. 24, 32-34, 153-154).

Smith encouraged Nath to invest in REBSCS, (T. pp. 16-17, 19, 129-133, 140, 179).

However, rather than a direct purchase of stock by Nath, Smith, at the meeting at Nath's home on February 11, 1980, advised Nath to form Nath Holdings, Inc. (Exhibit 8) through which Nath was to purchase stock in REBSCS for fifty percent (50%) of the stock of Nath Holdings, Inc. and REBSCS was to have the other fifty percent (50%) of the stock in Nath Holdings, Inc. The purpose of this was to keep control of REBSCS in Smith and Towles, (T. pp. 32-34, 160).

The meeting of February 11, 1980, lasted approximately two (2) hours, (T. pp. 131, 132).

Nath Holdings was formed on February 13, 1980, and the Certificate of Incorporation by the Kentucky

Secretary of State was issued on February 13, 1980, (Exhibit 8). This account was funded by a check for $30,200.00, which Nath gave to Smith on February 13, 1980, and Smith opened the bank account, (T. pp. 36-38, Exhibit 9A).

On February 15, 1980, Nath was paged by Smith at the hospital where he was working and was requested to contact Smith's office, (T. pp. 39-40). When he called, there was a message to go to Smith's office, (T. p. 89). Nath went to Smith's office and when he arrived Smith was there with Towles and Smith had prepared a check on the account of Nath Holdings Inc., in the amount of $30,000.00 for "10% of outstanding stock of REBSCS, Inc., subject to restrictions", (Exhibit 10, T. pp. 40-41).

Nath, for some unknown reason, hesitated to sign the original check for 10% of the outstanding stock of REBSCS and so advised Smith. Smith then voided the original check (Exhibit 10), and, at the direction of Nath, wrote out a check to REBSCS in the amount of $30,000.00 for a "loan", (Exhibit 11; T. pp. 40, 41, 42). Nath still thought he would get ten percent (10%) of the stock in REBSCS (T. pp. 156-158).

Smith told Nath the Thirty Thousand Dollars ($30,000.00) was not to be used for any purpose except for national advertising and obtaining licenses in the fifty states and District of Columbia and Smith told Nath that Towles and Smith had never taken a penny out of REBSCS, (T. pp. 13, 43). Nath was not advised by Towles or Smith that Towles would take Ten Thou-

sand Dollars ($10,000.00) of Nath's investment for prior business expenses (T. pp. 73, 635), even though Smith was aware of Towles' intention, (T. p. 631).

Nath was not told by Smith or Towles of the financial difficulties of REBSCS prior to the time he made the investment of Thirty Thousand Dollars ($30,000.00), (T. pp. 44, 47).

The Thirty Thousand Dollar ($30,000.00) check was apparently deposited in the account of REBSCS on February 15, 1980, the date it was issued, and on that date a Ten Thousand Dollar ($10,000.00) check was used to repay Towles for expenses; on February 29, 1980, a check in the amount of $5,577.87 was used to repay Towles for expenses, "set up and current", and on March 5, 1980, a Five Thousand Dollar ($5,000.00) check was issued to Referral Data Service, Inc. as a loan against 1,000 shares of stock of Referral Data Service, Inc. The disposition of this particular $5,000.00 was never shown. Towles had contributed to the formation of Referral Data Service, Inc., (T. p. 650). In twenty days after the deposit of the $30,000.00, over $20,000.00 had been withdrawn by Towles for either a loan or for pay-back of expenses, (Exhibit 7, see recap sheet).

Within two to four weeks after the transaction of February 15, 1980, Towles either became ill or lost interest in the business and became unavailable to answer Smith's telephone calls. From that time REBSCS has been, for all practical purposes, out of business, (T. pp. 49, 455-457).

Smith did advise Nath to obtain other counsel because of the possible conflict of interest between Towles and Nath and Smith and Nath. (T. pp. 390, 467-469, 476-477).

Smith did not refuse to allow Nath to inspect the financial records of REBSCS and did not misrepresent to Nath that Smith had no right to examine the books of REBSCS, but, in fact, made a search for the books, (T. pp. 116, 366, 480, 544-546).

Smith agreed to document the transaction between Towles and Nath. Nath testified Smith said he would prepare the necessary paperwork to document the transaction and this statement was made at the final closing when Nath signed the check for Thirty Thousand Dollars ($30,000.00), (T. pp. 41, 114). Smith admitted he said that he would be glad to prepare the documents when they reached an agreement as to what this was, (T. p. 354). However, Towles denied that Smith made that statement, (T. p. 648). No docmentation was ever prepared by Smith. However, it appears to the Trial Commissioner that there are mitigating factors in this charge, in that no agreement or understanding was made as to "what this (transaction) was".

Nath testified that he had only talked to Towles on two occasions and then not more than a total of fifteen or twenty minutes, (T. pp. 68, 69). However, the evidence clearly indicates that Nath was furnished detailed information regarding the workings of

REBSCS and even information regarding prospective purchasers of stock in REBSCS. This information had to come from Smith, (T. pp. 15, 16, 17, 19).

Nath has lost his Thirty Thousand Dollars ($30,000.00).

DISCIPLINARY RULES ALLEGEDLY VIOLATED BY SMITH

DR 1-102 Misconduct.
(A) A lawyer shall not:
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

DR 5-101 Refusing Employment When the Interest of the Lawyer May Impair His Independent Professional Judgment.
(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-104 Limiting Business Relations with a Client.
(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 5-105 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 6-101 Failing to Act Competently.
(A) A lawyer shall not:
(3) Neglect a legal matter entrusted to him.

This 12th day of August, 1982.

/s/ William R. Forester
William R. Forester
Trial Commissioner

(Exhibits Omitted)

* * * * * * *

RECEIVED OCT 29 1981
KY. BAR ASSN.

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V.

CHARGE

ERIC S. SMITH — RESPONDENT

* * * *

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent, Eric S. Smith, whose last known address is 117 West Second Street, Lexington, Kentucky 40507, a member of the Kentucky Bar Association, engaged in the following unethical and unprofessional conduct:

I

Beginning in or about 1977, Harendra Nath, M.D., whose last known address is P. O. Box 356, Lexington, Kentucky 40584, employed Respondent to perform various legal services including the incorporation of H. Nath, Chartered, a professional service corporation. Respondent and Nath developed a close attorney-client relationship and a close personal friendship. Nath paid Respondent a retainer fee of $100 per month to represent Nath in his personal legal business and Nath paid Respondent an additional retainer fee of $300 per month to serve as counsel for H.

Nath, Chartered. Nath consulted Respondent on virtually every business matter and financial investment, and Nath would not take any action until he had first sought Respondent's opinion and advice.

On or about July 2, 1979, a contract was executed whereby one Charles E. Towles employed Respondent to perform the legal services necessary to incorporate and represent a business known as Real Estate Buyers and Sellers Consultant Services, Inc. (hereinafter referred to as REBSCS). A true and correct copy of said contract is appended hereto, made a part hereof and marked as Exhibit A. Said contract provided that Respondent had a substantial and direct financial interest in the future success of REBSCS. Said contract further provided that Respondent had the right to inspect and audit the corporate books and financial records of REBSCS. Said contract further provided that REBSCS would not issue any shares of common capital stock without Respondent's prior written consent. Respondent subsequently incorporated REBSCS. On or about October 31, 1979, an addendum to said contract was executed by Respondent and by Charles Towles, individually; and as president of REBSCS, Inc. A true and correct copy of said addendum is appended hereto, made a part hereof and marked as Exhibit B.

In or about December 1979, Towles told Respondent that Towles wanted to find other persons to invest in REBSCS in order to raise sufficient funds to continue promoting REBSCS. Towles further told

Respondent that Towles had incurred over $10,000 in expenses to pay printing and advertising bills for which Towles desired to be reimbursed by REBSCS. At this time Respondent either knew or should have known that REBSCS was in serious financial difficulty.

In or about January and February 1980, Respondent had numerous conversations with Nath during which Respondent advised, encouraged and urged Nath to invest the sum of $30,000 in REBSCS. At no time did Respondent ever inform Nath that REBSCS was in serious financial difficulty and at no time did Respondent ever fully inform Nath as to the extent of Respondent's personal financial interest in and control over REBSCS. Respondent advised Nath to form a corporation known as Nath Holdings, Inc. and to invest $30,000 in Nath Holdings, Inc. Respondent further advised Nath that he and REBSCS should each own fifty percent (50%) of the stock in Nath Holdings, Inc., and that said $30,000 should then be used to purchase ten percent (10%) of the common stock in REBSCS. Nath relied on Respondent's advice and agreed to form Nath Holdings, Inc., so as to arrange for an investment of $30,000 in REBSCS. On or about February 13, 1980, Respondent caused to be prepared and filed in the office of the Secretary of State of the Commonwealth of Kentucky articles of incorporation for the purpose of incorporating Nath Holdings, Inc.

On or about February 15, 1980, Respondent told Nath it was imperative that Nath immediately invest

$30,000 in REBSCS. Nath went to Respondent's law office and Respondent had already prepared for Nath's signature a check in the amount of $30,000 to be issued by Nath Holdings, Inc., to REBSCS for the purpose of purchasing ten percent (10%) of the outstanding stock in REBSCS. A true and correct copy of said check is appended hereto, made a part hereof and marked as Exhibit C. Nath decided that he would rather make a direct loan of $30,000 to REBSCS instead of using Nath Holdings, Inc., to purchase stock. Respondent and Towles agreed to said loan. Respondent prepared a second check for Nath's signature in the amount of $30,000 made payable to REBSCS. Nath signed the second check and it was given to Towles. A true and correct copy of said second check is appended hereto, made a part hereof and marked as Exhibit D. Respondent assured Nath that Respondent would prepare a promissory note and all other legal documents necessary to evidence and secure said loan of $30,000 but Respondent subsequently failed and neglected to prepare a promissory note or any other legal documents necessary to evidence and secure said loan.

Prior to Nath signing the second check on February 15, 1980, for the $30,000 loan to REBSCS, at no time did Respondent ever inform Nath that most of the $30,000 would be used to reimburse Towles for expenses Towles had allegedly incurred in promoting REBSCS. Respondent told Nath that the proceeds from the $30,000 loan was going to be used

for national advertising and for registering REBSCS to do business in other states.

After Towles received the check from Nath for $30,000 on February 15, 1980, Towles cashed the check and disbursed the bulk of the proceeds to himself. Towles ceased actively promoting and working on REBSCS. In or about March, April and May, 1980, Nath and Respondent had various conversations during which Nath told Respondent that he was upset, concerned and apprehensive about recovering his $30,000 loan. On one or more occasions Nath requested Respondent to review the financial records of REBSCS to determine the financial status of REBSCS, to determine whether any of Nath's $30,000 remained and to determine whether Nath could possibly recover any portion of the $30,000 loan. Respondent falsely stated and misrepresented to Nath that Respondent had no authority to review or to gain access to the financial records of REBSCS. Respondent took no action to protect Nath's interest. As a result of Respondent's actions described above, Respondent's client, Nath, suffered a loss of approximately $30,000.

WHEREFORE, Complainant charges that Respondent's actions violate Disciplinary Rules 1-102(A)(4), 5-101(A), 5-104(A), 5-105(A) and 6-101(A)(3) of the American Bar Association's Code of Professional Responsibility adopted by the Supreme Court of Kentucky pursuant to SCR 3.130, and constitute unethical and unprofessional conduct tending

to bring the bench and bar of Kentucky into disrepute. An appropriate degree of discipline should be administered to Respondent in accordance with SCR 3.370 and SCR 3.380.

/s/ Herbert D. Sledd
HERBERT D. SLEDD, CHAIRMAN
INQUIRY TRIBUNAL
KENTUCKY BAR ASSOCIATION

ATTEST:
/s/ Leslie G. Whitmer
LESLIE G. WHITMER, DIRECTOR
KENTUCKY BAR ASSOCIATION

(Exhibits Omitted)

* * * * * * *

RECEIVED: JUL 11 1984
SUPREME COURT OF KENTUCKY
83-SC-144-KB

KENTUCKY BAR ASSOCIATION, COMPLAINANT

v. ORIGINAL ACTION IN SUPREME COURT

ERIC S. SMITH RESPONDENT

ORDER GRANTING STAY

Respondent's motion for a stay pursuant to CR 76.44(b), is hereby granted and Respondent is hereby granted a stay of the effective date of the Opinion of this Court herein, and the operation SCR 3.390, without bond, for a period of 90 days from July 5, 1984.

Entered this the 11th day of July, 1984.

/s/ J. Calvin Aker
Deputy Chief Justice

COUNSEL FOR COMPLAINANT:

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* * * * * * *

SUPREME COURT OF KENTUCKY
83-SC-144-KB

KENTUCKY BAR ASSOCIATION, COMPLAINANT

v. ORIGINAL ACTION IN SUPREME COURT

ERIC S. SMITH, RESPONDENT

RESPONDENT'S PETITION FOR REHEARING AND MODIFICATION

Pursuant SCR 3.440 and CR 76.32, Respondent, by Counsel, petitions this Court to grant him a rehearing and to modify its Opinion, for the following reasons:

1.) This Court misconceived the issues presented, confusing the mere presence of conflicting interests with representation of conflicting interests. In so doing, this Court promulgated a new rule which is unsound, vague, administrative unworkable, and completely at odds with its existing rules.

2.) This Court inadvertently accepted the Board's use of inappropriate evidentiary presumptions (taken out of context from civil suits against attorneys) and thus confused the light evidentiary burden required to deprive an attorney of the benefit of a bargain, with the much heavier burden required before he can be deprived of

his constitutionally protected right to practice law.

3.) Further, controlling cases of this Court have always prohibited retroactive application of new disciplinary rules (and punishment) in cases of first impression. Other relevant cases hold that use of the disciplinary process for the purpose of resolving private civil disputes should be carefully avoided. The Court should reconsider this case in light of these relevant, controlling decisions.

THIS COURT PROPERLY RESOLVED ALL FACTUAL DOUBTS IN FAVOR OF RESPONDENT

This Court, acknowledging the extensive conflict in testimony, properly resolved all factual doubts in favor of Respondent.[1] Although it adopted the

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1. The resolution of all factual doubts in favor of the Respondent, has been mandated since 1905, when the Court reversed an order of disbarment in *Tudor* v. *Commonwealth*, Ky., 84 S.W. 522 (1905), stating that "*the court should never disbar a lawyer, and thus deprive him of his chosen profession, and perhaps his only means of a livelihood, on testimony of a doubtful character.*" (emphasis added). See also *K.B.A.* v. *Franklin*, Ky., 534 S.W.2d 459 (1976); *K.S.B.A.* v. *Taylor*, Ky., 482 S.W.2d 574 (1972). Admitting that he filed the complaint because he believed Smith could thereby be intimidated and coerced into paying him $30,000.00, *Nath's vascillating testimony, contradicted even by the testimony of his new attorney, is justifiably unworthy of belief. This Court's Opinion actually reflects the fact that Nath's testimony provides no reliable basis for a disciplinary sanction against Smith.*

Board's decision, this Court based its conclusion that Smith was guilty of unethical conduct on a new factual premise, entirely different from that alleged by the K.B.A. It based Smith's punishment on his own uncontradicted testimony that he prepared the check whereby H. Nath Holdings, Inc. loaned money to REBSCS.

No request is made that this Court again review the massive record. Even though incomplete,[2] and at

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2. These *important and uncontradicted* facts do not appear in this Court's Opinion:

a. *Eric Smith received no remuneration, no commission, no attorney's fee, and no personal benefit of any kind from the loan to REBSCS!*

b. *$5,000 of the money loaned to REBSCS was in fact thereafter loaned, by REBSCS, to a corporation 20% owned by Nath! That loan from REBSCS was never repaid.* Trial Commissioner's Report, p. 13.

c. Nath asked Smith to prepare the check by which H. Nath Holdings, Inc. made its loan to REBSCS, and Nath himself dictated the wording of the check, *without any urging or advice from Smith.* Nath, T. pp. 40-42; Trial Commissioner's Report, p. 12.

d. Nath never filed any civil action against Towles or REBSCS to secure repayment of the loan, even though Towles' uncontradicted testimony was that Towles was solvent and able to pay. Towles, T. pp. 622-24, 645-47. *In fact neither Nath, nor anyone on his behalf, has ever contacted Towles or REBSCS requesting repayment!* Towles, T. pp. 601-603. Therefore this Court can not properly find that "Nath lost any hope of the loan being repaid", Opinion, p. 3.

e. Nath has never filed any civil action against Smith for malpractice or any other cause of action, even though Smith was fully insured.

times inaccurate,[3] this Court's independent findings of fact actually exonerate Respondent from violation of any known or recognized ethical rule. It is this Court's adoption and retroactive application of the inappropriate evidentiary presumptions introduced by the Board, and derived from the Board's condemnation of all business dealings between attorneys and clients, that is ill-conceived and unjust.

THE MERE PRESENCE OF CONFLICTING INTERESTS WAS CONFUSED WITH REPRESENTING CONFLICTING INTERESTS

There has never been a finding that Smith represented or served as attorney for either REBSCS or Nath in their dealings with each other. Clearly he did not. Consequently, Smith was never in violation of DR 5-101(A), 5-104(A), 5-105(A) and 6-101(A)(3), because violation of those rules requires a finding that conflicting attorney-client relationships existed *with regard to the particular transaction in question.*[4]

3. The Opinion erroneously implies that Nath had made the loan, personally. Opinion, p. 3. *The testimony, however, is uncontradicted that the loan was made by H. Nath Holdings, Inc., a corporation which Respondent formed, but never represented (i.e., never performed legal services for), and which never paid Respondent a fee of any type. Therefore the statement on p. 1 of the Opinion that "Respondent was paid a retainer by this corporation" is incorrect, as are the statements on p. 2, that Nath made an unsecured loan to REBSCS, and pp. 3-4, that "Respondent . . . participated in a transaction whereby one client lent money to another . . ."*

4. *Furthermore, this court found no misrepresentation by Respondent, and therefore found no violation of DR 1-102(A)(3). In summary, this Court found no violation by Respondent of any of the disciplinary rules he was charged as having violated.*

Instead, this Court found only that "Respondent represented Towles and REBSCS generally; he owned an interest in REBSCS," and that "Respondent also represented Dr. Nath and his corporations generally." But "general" representation of clients in other, unrelated matters does not violate the rules cited above.

Smith's proven defense, that he refused to, and in fact did not, serve as attorney for either Nath or REBSCS in their dealings with each other, should not have been characterized by this Court as a "non-defense." Equally improper was this Court's ruling that Smith's disclosure of his interest in REBSCS to Dr. Nath, and the fact that Nath had been informed of how the loan was going to be applied, were "beside the point." Such pronouncements unjustly criticize this Respondent, and thus attorneys in general, for adhering to this Court's known disciplinary rules. This Court then stated that "a lawyer simply cannot sustain a plea of no conflict of interest in such a scenario." Opinion, p. 4. But this oversimplication is not correct, because *the mere existence of conflicting interests has never been punishable.* Until now only the *representation* of conflicting interests (without full disclosure and consent) has been the basis for disciplinary sanction in conflict of interest cases. In 1962, the Court made this clear, stating:

> It is unprofessional to represent conflicting interests except by express consent by all con-

> cerned given after full disclosure of the facts. *Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. In re Advisory Opinion of K.S.B.A.*, Ky., 361 S.W.2d 111. (emphasis original).

In 1974, the Court further advised the Bar that "*to have a conflict of interest there must be conflicting attorney client relationships in existence at that time, . . .*" *In re Advisory Opinion of K.B.A.*, Ky., 526 S.W.2d 306, 307 (emphasis added).

Clearly, "general" representation of clients, in other matters, not involving the actual conflict in their interests, *is not* sufficient under these Advisory Opinions to constitute a prohibited representation of conflicting interests. Only representation of clients in the particular transaction in which their interests actually conflict *(without full disclosure and consent)* is prohibited and punishable.

This was also the holding in this Court's two most recent conflict of interests cases, *K.B.A.* v. *Roberts*, Ky., 579 S.W.2d 107 (1979) and *In re Cahill*, Ky., 230 S.W.2d 633 (1950). Those cases involved multiple representation of parties in the *particular* conflict situation. In this case, however, Smith's acknowledged refusal to serve as attorney for either REBSCS or Nath in this specific transaction, his proven admonition to Nath to seek separate legal counsel, and his undeniable disclosure to Nath of his personal in-

terest in REBSCS (as well as all other facts within his knowledge), not only disprove any prohibited representation of conflicting interests, they clearly prove Smith's good faith compliance with DR 5-101(A), 5-104(A), 5-105(A)-(C), and 6-101(A)(3).

PREPARATION OF A CHECK DOES NOT CONSTITUTE REPRESENTATION AND IS NOT UNETHICAL CONDUCT

Not finding any violation of the rules of the 1978 ABA Code of Professional Responsibility (adopted by this Court in SCR 3.130), this Court fixed guilt and imposed punishment only on the finding that "Respondent prepared a check, and to that extent participated in a transaction whereby one client lent money to another of Respondent's clients, a corporation in which Respondent had an interest." But the preparation of a check *does not* constitute the rendering of legal services. It is a routine clerical act performed for others by both laymen and lawyers every day.

The definition of what actions constitute the practice of law, set forth in SCR 3.020, has never been so broadly construed as to encompass this clerical act, without something more, and *this Court has found nothing more.*

Here, the loan was made after repeated advice to Nath by his CPA that the transaction was risky.[5] No legal advice was given, or legal service performed, by Smith.[6] He only "prepared a check" drawn on the account of a corporation which he had formed but never thereafter represented, nor which had ever paid him a fee. *Mere preparation of a check is certainly no proof of representation,* and under these circumstances cannot be and should not have been considered unethical.

THE NEW RULE IS UNSOUND AND CONFLICTS WITH EXISTING RULES

In punishing Smith, this Court has overlooked the far reaching effect of this decision. There was no rule, prior to this Court's Opinion, that made ineffective Smith's limitation of his representation of REBSCS and Nath to matters not involving their joint dealings. By characterizing Smith's refusal to represent Nath and Towles in their joint dealings as a "non-defense," because he represented each "general-

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5. See Eakle (Nath's CPA) T., pp. 180-93, 202-03, 208-10; Nath, T., pp. 75-77, 78. *Clearly Nath had been advised of the risk and had accepted it.* He knew all about the operations of REBSCS, even to the point of designing a similar company for the computer assisted sale of antiques. Nath, T., pp. 66-67, 71-74; Smith, T., pp. 290-305, 310-317. *See also Trial Commissioner's Report, p. 14 finding, "... the evidence clearly indicates that Nath was furnished detailed information regarding the workings of REBSCS..."*

6. In fact Smith tried to discourage Nath from becoming involved with REBSCS.

ly" in other matters, this Court has created a new rule completely at odds with those cited above. Can an attorney never withdraw from representation in the limited area of conflict? Must an attorney, to avoid suspension, now refuse to continue to represent a client in any other matter, so long as that client desires to deal with another of the attorney's clients, or for that matter, with an attorney himself?

This has *never* been previously required. No practical rule would require Smith to refuse to represent Nath in his dealings with hospitals or in his acquisition of a farm, or require Smith to discharge REBSCS as a client, and/or divest his option interest therein, simply because Nath was interested in REBSCS. Such extreme results have never been mandated by this Court's adopted and published Rules, and to do so now would work an unreasonable and unnecessary hardship on all concerned.

Prior to this case, an attorney wishing to deal with a client was only required by DR 5-101, 5-104 and 5-105 to fully disclose the conflict and possibly advise the client of the advisability of separate representation. That Smith did this has been conceded. Smith did *not* negotiate or otherwise deal with Nath. This Court has acknowledged that Smith did not solicit the loan or Nath's interest in REBSCS. Smith was involuntarily thrust into an awkward position, as a result of Nath's interest in REBSCS. Smith then, in good faith, complied with this Court's adopted Disciplinary Rules. Certainly there was a potential

THIS COURT WAS MISLED BY THE BOARD'S INTRODUCTION AND USE OF INAPPROPRIATE EVIDENTIARY PRESUMPTIONS

In reviewing the Opinion of the Board of Governors this Court will find five *civil actions* relied upon. One of which, *Daugherty* v. *Runner,* Ky. App., 581 S.W.2d 12 (1978), was cited *four times.* Although quoting extensively from the ethical considerations underlying this Court's adopted disciplinary rules, the Board in fact abandoned those rules in favor of a new standard, heretofore applied only in civil damage suits against attorneys. The Board's departure from this Court's established disciplinary rules is most clearly illustrated in its statement that:

> Applicable Disciplinary Rules under this Canon particularize these aspirational statements into hard rules, and *facially* seem to provide that almost anything goes, with disclosure and consent by the clients; see DR 5-101(A), 5-104(A), and 5-105(A) and (B). As noted below, however, disclosure and consent do not in any way mitigate a lawyer's continuing fiducial obligation to the client. (emphasis original). Opinion of Board of Governors, p. 5.

This statement clearly shows the Board's disagreement with the principles stated in this Court's disciplinary rules. Going far beyond in the principles reflected in those rules, the Board then announced that "*uberrima fides*" that is the standard to

conflict of interest in any dealings between Nath and REBSCS; however, Smith disclosed the conflict. More significantly, *he limited his representation* of each to areas other than those in which they dealt together. This Court now says that an attorney cannot limit his representation of clients in this way. Now, after this Opinion, if an attorney is involved even in very limited business dealings with a client (even though he discloses his interest, does not in fact represent the client in the transaction, and warns the client to seek separate legal advice, *all of which Smith did*), he will be suspended from the practice of law if the project fails, even though (as here) the failure was unpredictable and in no way the fault of the attorney.[7] This result is clearly unsound.

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7. *This Court correctly recognized that the business failure of REBSCS had nothing to do with Smith, and was in no way predictable.* Further, this Court acknowledged that Smith *did not* solicit Nath's interest in REBSCS. This Court's Opinion did not, however, reflect the Court's recognition of the uncontradicted facts that Smith *did not benefit from the loan to REBSCS, nor did he receive any proceeds from that loan. Nor did this Court acknowledge that Smith's losses, when REBSCS became dormant, were every bit as severe as Nath's alleged loss. Eric Smith clearly did not benefit at the expense of Nath!*

be applied in any business dealings between an attorney and a client.

Taking this standard out of context, the Board failed to distinguish that such a duty is owed to a client *only with regard to the subject matter of the representation*, but *not* in circumstances where employment has been limited, as in this case, to others matters not involving the transaction between the attorney and the client. The Board's erroneous reasoning culminated in the following statement:

> Kentucky Courts have consistently held that the principle of *uberrima fides* is almost *per se* inconsistent with a lawyer's entangling his personal and financial affairs with those of his client, particularly where the entanglement involves the subject of the underlying representation. There is a flat presumption that the lawyer has overreached his client; see *Palm's Administrators* v. *Howard*, Ky. 1908, 112 S.W. 1110; *Hunt* v. *Picklesimer* Ky. 1942, 162 S.W.2d 27; see also 7 Am. Jur. 2d, *Attorneys at Law*, Section 125. (emphasis original). Opinion of Board of Governors, p. 7.

In effect the Board is condemning all business dealings between attorneys and clients. Moreover, the Board obviously presumes that such dealings *per se* violate an attorney's ethical duty to clients. This has never been the rule in Kentucky, nor is there such a presumption of ethical violation against attorneys. The proper rule is set forth in DR 5-104(A):

> DR 5-104(A). A lawyer shall not enter into a business transaction with a client if they have differing interests *and* if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure. (emphasis added).

This is the rule. Once an attorney informs the client that he cannot represent him in the transaction, and advises him to seek separate counsel (as did Smith), there is no overriding duty for that attorney to use his utmost efforts to protect a person he does not represent.

In disciplinary cases there is no "flat presumption" that attorney-client dealings are unethical, nor is there a presumption that the lawyer has overreached his client. There is no presumption that business dealings between attorneys and clients are a *per se* violation of any disciplinary rules. The Board's statements say otherwise, and simply illustrate the fact that Smith was subjected to a standard heretofore unknown in disciplinary cases. Instead of facing the standard set forth in SCR 3.330 that the charges must be proven by "substantial evidence", Eric Smith was obviously tried and found guilty through the Board's use of inappropriate evidentiary presumptions drawn from civil cases, where the only issue at stake was whether an attorney was to be deprived of the benefit of a bargain, not (as here) his constitutionally protected right to practice.

In relying on the decision of the Board of Governors, this Court has been misled into the adoption of this distorted disciplinary standard and burden of proof. It is one thing for this Court to require an attorney, when a client brings suit to rescind a contract, to prove that the contract was fair and that there was no overreaching. It is an entirely different thing to require an attorney to prove his innocence in a disciplinary case against him. The Board of Governors decision would require Smith to do just that. And with all business dealings being per se violations, how could Smith have proven his innocence?

Obviously a civil rule should not be applied here. We are not dealing with a civil dispute. An entirely different standard should have been applied by the Board of Governors. SCR 3.330 states in part that "... the burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by substantial evidence." Although "substantial evidence" is a rather vague guide, the U.S. Supreme Court has in recent cases indicated that the proper standard to be applied is a "clear and convincing" evidentiary standard. As stated in *Addington* v. *Texas*, 441 U.S. 418 (1979):

> The function of a standard of proof ... is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions ...' the standard serves to allocate the risk of error

between the litigants and to indicate the relative importance attached to the ultimate decision.

One typical use of (it) is in civil cases involving allegations of fraud or some other quasi-criminal wrong doing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduced the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used a 'clear, unequivocal, and convincing' standard to protect particularly important individual interests in various civil cases. *Id.* at 423-24. See also *Santosky* v. *Kramer*, 455 U.S. 745 (1982).

Surely the burden of proof should be more exacting to sustain the suspension of an attorney, than that required to obtain a mere civil judgment. On reflection, this Court will see this distinction and realize the injustice done to Respondent. In this case of "first impression", the Board of Governors has been misled by reliance on civil cases. And, in reliance on the Board of Governors, this Court has also been misled.

THE NEW RULE IS UNSOUND, VAGUE AND ADMINISTRATIVELY UNWORKABLE

Unless changed by this Court, this new rule will be a continuing source of controversy. It is not only unsound, but in its presumption that all business dealings between attorneys and clients are now ethically suspect, it is incredibly vague and confuses once clear

ethical rules. It sets no clear standard, and gives no meaningful guidance to attorneys involved in business dealings with clients. Certainly, this Court's characterization of such transactions as "conflicts of interest" is not instructive.

After this Opinion, can an attorney ever safely enter into a business transaction with a client? Was not a part of the basis for Smith's punishment the alleged loss of money, a factor that can only be determined *after the fact?* Is the thrust of this Court's Opinion to indirectly prohibit business dealings which it could not constitutionally, directly prohibit? And if so, who would benefit from such a prohibition? Such a rule indicts the integrity of the entire Bar. Surely this Court does not mean to say that lawyers cannot be trusted to deal fairly with clients in business transactions.

There is nothing inherently wrong with attorneys and clients entering into business together. It is done every day. And when done with full disclosure and consent, (i.e., in full compliance with the prior published rules of this Court) it can be advantageous to all concerned. There is no reasonable basis for this Court to condemn such transactions, as did the Board. To do so is the equivalent of stating to the public that this Court believes that lawyers cannot fairly deal with clients.

This new rule will make attorneys guarantors of business deals with clients, with their licenses at risk.

It is always unfortunate if money is lost, but a business can become dormant (as REBSCS did) without misconduct, and even in spite of an attorney's best efforts. Attorneys have never and should not now, at the risk of their professional careers, be required to guarantee the success of any project in which they may be interested as private individuals.

Attorneys are often placed in conflict of interest situations. For example, attorneys involved in real estate closings between parties with conflicting interests often prepare checks for one or both. Eric Smith was found guilty of nothing more than what these attorneys do every day. The fact that he had an option interest in the borrower does not make this situation distinguishably different.

If a bank makes a *bad business decision* in making a loan, will the attorney who closes the loan be liable to the bank? Certainly not, unless he *represents* the bank and is guilty of some malpractice. And clearly the closing attorney should not be disciplined by the Bar, because of a bank's *bad business decision in making a loan.* This case is no different. Here there was no moral turpitude, no wrongful conduct, and no representation by Smith of the lender (or borrower). In this case, Smith's mere participation in preparing a check, coupled with a subsequent alleged loss of money, was considered enough for this Court to suspend his right to practice law for 18 months, with all the consequential damage to his unblemished career, reputation, and standing in the community.

This new rule is administratively unworkable. Unless it is changed, not only will Eric Smith be unjustly punished, this Court will open itself to a plethora of disciplinary complaints, anytime an attorney has been involved in a business transaction with anyone whom he had previously represented, and that transaction fails. Such complaints can now and will hereafter occur whether or not the attorney has disclosed the conflict, advised separate representation, or realized no monetary gain. This is a very dangerous precedent! Such a rule will lead to the kind of abuse of the disciplinary process, which can be seen in this case. It will leave honest attorneys at the mercy of the unscrupulous, who will see this (as Nath did) as a no cost method of coercing payment of business losses from attorneys, when advised that no malpractice or other civil action exists. Indeed, unscrupulous clients may be encouraged by this to seek out attorneys to be their business partners, not for their trustworthiness and business knowledge, but in order to have the threat of a disciplinary complaint as extra "insurance". Such a rule would create a dangerous trap for attorneys and an administrative nightmare for this Court.

RETROACTIVE APPLICATION OF THE NEW RULE VIOLATES STATE AND FEDERAL DUE PROCESS GUARANTEES

This Court admits that this case is "one of first impression in this Commonwealth." As such, it should

be apparent to this Court that in this area there has been no prior warning or effective guidance for attorneys provided by any prior case, or this Court's adopted rules. Under these circumstances, to punish an attorney for a violation of a rule which he did not and could not know existed, violates both state and federal constitutional due process guarantees.

On two prior occasions, this Court refused to apply a newly adopted disciplinary rule retroactively. In *K.B.A.* v. *Ball,* Ky., 501 S.W.2d 253, 255 (1971), the Court in deciding "*the new rule* requiring automatic disbarment *should not be given ex post facto effect,*" based its ruling upon "*elemental justice and basic due process*" (emphasis added). See also *K.S.B.A.* v. *Taylor,* Ky., 516 S.W.2d 871 (1974). Although these cases dealt with adoption of a new rule, and not with what may here be argued to be a simple extension or interpretation of an existing vague standard, the principle should be the same. A retroactive application of a new "interpretation" was held to violate Federal due process guarantees in *Re Ruffalo,* 390 U.S. 544, 201 L. ed. 2d 117, 88 S. Ct. 1222 (1968), a case in which the respondent's alleged misconduct consisted of hiring a railroad car inspector during his off duty hours to investigate FELA claims against his employer. The charge of misconduct, however, was not in the original charges against the respondent, but was added as a result of his own testimony. In reversing an order of disbarment, the U.S. Supreme Court stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge.
>
> In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation'. 370 F2d, at 462.
>
> *These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they're under way, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. . . .* (emphasis added).
> *This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprive petitioner of procedural due process. Id.* at pp. 122-23, citations omitted, emphasis added.

The circumstances attending this Court's suspension of Eric Smith are remarkably similar. He had no warning this Court would consider his conduct "unethical". And as in *Ruffalo,* the alleged impropriety of the conduct for which Smith is to be punished is not immediately apparent, and is such concerning which reasonable attorneys would differ. Punishment

of Smith, under these circumstances, also violates substantive due process principles. As Justices White and Marshall, concurring in *Ruffalo,* stated:

> *A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the roles can be deemed to have been on notice that the courts would condemn the conduct for which he was removed....*
>
> Even when a disbarment standard is as unspecific as the one before us, members of the bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. *It also includes conduct which all responsible attorneys would recognize as improper for a member for the profession.*
>
> The conduct for which the Court of Appeals disbarred petitioner cannot, however, be so characterized. Some responsible attorneys, like the judge who refused to order petitioner disbarred from practice in the Northern District of Ohio, 249 F Supp 432 (1965), would undoubtedly find no impropriety at all in hiring a railroad worker, a man with the knowledge and experience to select relevant information and appraise relevant facts, to "moonlight" - work on his own time - collecting data. On the other hand some, like the officials of the Mahoning County and Ohio State Bar Associations, would believe that encouraging a man to do work arguably at odds with his chief employer's interests is unethical. *The appraisal of petitioner's conduct is one about which*

> *reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question. I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.* (emphasis added) *Id.* at pp. 124-25.

This principle was also stated in *K.S.B.A.* v. *Taylor*, Ky., 482 S.W.2d 574, 583 (1972):

> *. . . when the rules are loosely couched in terms of high principle, as are the canons, there is room for differences of opinion, hence the distinct possibility that they do not provide sufficiently explicit "no trespassing" signs for those who may approach the invisible line of proscription. For this reason, if for no other, simple justice dictates that in arriving at a final determination all doubts be resolved in favor of the respondent.* (emphasis added).

In six previous "first impression" cases, this Court recognized these due process limits and dismissed the charges (or at most reprimanded the offending party), and advised members of the bar of the promulgation (or interpretation) of the rule to be applied thereafter, and that *subsequent* violation would be more severely punished. In *K.B.A.* v. *Graves*, Ky., 556 S.W.2d 890, 892 (1977), the Court, *finding (unlike this case) "that Graves conduct in this matter violates*

every concept of ethical conduct required of an attorney," imposed only a public reprimand, stating "(t)his action is prompted by unusual facts which have not previously been presented." (emphasis added). See also *K.S.B.A.* v. *Tussey,* Ky., 476 S.W.2d 177 (1972); *Frazee,* v. *Citizens Fidelity Bank and Trust Co.,* Ky., 393 S.W.2d 778 (1965); *K.S.B.A.* v. *First Federal Savings and Loan Ass'n,* Ky., 342 S.W.2d 397, 400 (1961), where the Court stated, *In view of the fact that this particular phase of commercial activity has not heretofore been considered, . . . we are not at this time inclined to impose a penalty"* (emphasis added); and *Bonner* v. *Goodloe,* Ky., 266 S.W. 62 (1924) and *Hendrick* v. *Posey,* 45 S.W. 525 (1898). *After diligent search, we have found no disciplinary case in Kentucky, imposing more than a reprimand in a case of first impression.*

SUSPENSION SHOULD NOT HAVE BEEN IMPOSED AND IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The punishment imposed in this case is incredibly harsh. The circumstances are unusual, and this Court has been offered no guidance from other jurisdictions, because there has been no case found with similar facts. On March 22, 1983, however, two days prior to the filing of Respondent's Brief, the Oregon Supreme Court decided the remarkably similar case of *In re*

Scott, Or., 660 P.2d 157 (1983).[8] But in *Scott*, the Oregon Court properly found Scott had violated DR 5-101(A) and DR 5-105(A)-(C), because of his *failure to disclose* the conflicting interests. For that failure, *and not for dealing with a client*, Scott was reprimanded.

This Court found no such failure to disclose, nor any other violation of the 1978 ABA Code, which this Court has adopted as "a sound statement of the standards of professional conduct required of members of the bar . . ." SCR 3.130. Instead it found only "poor judgment", in preparing a check (at Nath's request and according to his directions). But "poor judgment" alone, without some further proof of moral turpitude, has never been sufficient ground for suspension in Kentucky. *After diligent review, we have found no Kentucky case where an attorney guilty of only "bad judgment," was punished by more than reprimand or*

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8. In that case attorney Scott owned 26% of Modular Systems, Inc. He (unlike Smith) was a corporate officer, as well as attorney for the corporation. He also represented Mrs. Glantz, procuring for her a $6,000 payment. He hereafter (unlike Smith) solicited a $10,000 loan from Glantz for Modular Systems. In procuring the loan he admitted that (unlike this case) he did not disclose to Glantz that their interests were adverse; and, he did not advise her to seek separate counsel. Although Scott prepared a note and second mortgage for Glantz, the interest rate was less than the market rate for a second mortgages, and she was given no title certification or insurance to establish the validity of her mortgage. Later there was a default, and there is no indication from the Opinion that Glantz was ever repaid. Scott entered a plea of no contest. *Surely Scott's conduct was much more egregious than the innocent conduct of the Respondent in this case.*

censure. See *K.S.B.A.* v. *Jones,* Ky., 372 S.W.2d 794 (1963); *Duffin* v. *Commonwealth,* Ky., 271 S.W. 555 (1925).

Eric Smith has never previously been the subject of bar discipline or complaint. His record has been spotless and exemplary. As a law journal editor, graduating with distinction and serving as a law clerk of this Court, he has consistently achieved significant honors and respect in his study and practice of law. And in Kentucky "*an attorney's previous clear record and unquestioned good character is entitled to great weight in passing upon the discipline or penalty to be administered.*" *In re Weaks,* Ky., 118 S.W.2d 525, 526 (1938), emphasis added.

THIS COURT SHOULD HAVE DISMISSED THE CHARGES BECAUSE OF NATH'S ABUSE OF PROCESS

A reopening of this case was requested, when Nath came to Smith seeking money, and informing him that he (Nath) had been advised by his accountant and new lawyer that they believed Smith would pay Nath $30,000, if Nath filed a complaint with the Kentucky Bar Association.[9] Nath's open admission of his abuse of the disciplinary process of this Court, to

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9. *This Court's denial of Respondent's Motion to reopen the case was not prejudicial to Respondent, only because all factual doubts were resolved in Respondent's favor and Nath's testimony was not relied upon.*

recover money at no cost to himself, casts the severest doubt upon his credibility. And although this Court has recognized that Nath's conflicting testimony did not provide a sufficient foundation upon which to discipline Smith, his admitted abuse of this proceeding as a tool for private monetary gain should not be countenanced by this Court. As the Court stated in *K.B.A.* v. *LaBach*, Ky., 564 S.W.2d 11, 13 (1978), in reducing a Board of Governors recommendation of disbarment to a public reprimand,

> While we certainly do not intend to deter the bar association from the continuance of - indeed commend it for - its constant vigil to maintain a high level of competence and integrity throughout the legal profession, *neither are we in the business of settling private disputes* . . . (emphasis added).

Further, the Court recognized that,

> *Our disciplinary processes provide a way to purification of our profession but it is highly important that the way does not become an avenue to personal, religious or political reprisal. The possibilities of such misuse must be held to a minimum. In re Wehrman*, Ky., 327 S.W. 2d 743, 744 (1973). (emphasis added).

The use of bar disciplinary proceedings as a club to accomplish the resolution of business disputes enhances neither the public's respect for the profession or its own sense of integrity.

Nath had no civil action against Smith. And this proceeding is nothing more than an attempt to intimidate and coerce an attorney into paying Nath money which he does not legally or morally owe. This Court should not allow such a contemptable abuse of this Respondent and this Court.

CONCLUSION

Here is a reputable lawyer with an excellent record who has been told by this Court that he has violated no announced rule of ethics. In fact he has been told by this Court that his compliance with its published disciplinary rules (i.e. his refusal to represent conflicting interests) is a "non-defense." For this Court to then punish him for an activity not amounting to the practice of law, a mere ministerial act involving no moral turpitude, fraud, misrepresentation or overreaching, is inherently wrong. In its reliance upon the Board's unsound Opinion and apparent sympathy for Nath's alleged loss, this Court confused the principle set forth in its two Advisory Opinions that it is, and should be, the rendering of some legal service in a conflict situation (i.e. the *representation* of conflicting interests, *without full disclosure and consent*) that is the proscribed conduct, not (as here) performance of only an extremely limited clerical act.

In so doing this Court has adopted a new rule, and held Smith to a new standard completely beyond and at odds with this Court's adopted rules. There was no

prior notice to Eric Smith, or any other member of this Bar, that such innocuous conduct would be considered "unethical" by this Court, or that a refusal to represent parties in the limited area of their conflict would be characterized as a "non-defense". Without such prior notice, any retroactive condemnation and punishment of such conduct violates both state and federal due process guarantees.

The Board's Opinion improperly shifted the burden of proof to Respondent. The Board started from a position that it is a *per se* violation of an attorney's ehtical duties to become involved in financial dealings with a client. The Board's erroneous use of civil evidentiary presumptions was inadvertently adopted by this Court. The result is a new rule, promulgated without the usual hearings procedure this Court has traditionally used to examine a new rule's prospective effect. Had such prior hearings been held, this Court would have realized that this new rule is not a workable rule for the attorneys of Kentucky. It condemns conduct which is as common place as it is innocent. It will have an extreme chilling affect on all business transactions between attorneys and clients, and will place attorneys at the mercy of the unscrupulous. Their licenses at risk, other attorneys will face, as Smith has, the threat of disciplinary proceedings as a tool of intimidation and coercion. Far worse, by punishing attorneys for becoming involved in business transactions with clients, this Court will be sending a message to the public that this Court

does not feel that attorneys can be trusted to fairly and honestly deal with their clients. Such a rule itself tends to bring the Bar into disrepute. The result would be not only an injustice to this Respondent but to the members of the Bar and this Court itself.

For the reasons set forth above, this Court should dismiss the charges against Eric Smith, or in the alternative, grant a rehearing and oral argument before this Court.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY
FILE NO. 83-SC-144-KB

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V.

ERIC S. SMITH — RESPONDENT

RESPONSE TO PETITION FOR REHEARING AND MODIFICATION

Respectfully submitted,

/s/ Michael M. Hooper
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CERTIFICATE OF SERVICE

I certify that a true copy of this Response was mailed to counsel for respondent, Bert T. Combs, 2800 Citizens Plaza, Louisville, KY 40202, and Ben L. Kessinger, Jr., 400 Bank of Lexington Building,

101 East Vine Street, Lexington,
KY 40507, this 4 day of
January 1984.

/s/ Michael M. Hooper
MICHAEL M. HOOPER

SUPREME COURT OF KENTUCKY
FILE NO. 83-SC-144-KB

KENTUCKY BAR
ASSOCIATION — COMPLAINANT

V. **RESPONSE TO PETITION FOR REHEARING AND MODIFICATION**

ERIC S. SMITH — RESPONDENT

* * *

MAY IT PLEASE THE COURT:

THE COURT SHOULD MODIFY ITS OPINION TO ADOPT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE BOARD OF GOVERNORS TO AVOID UNNECESSARY CONFUSION AND MISINTERPRETATION.

Complainant fully agrees with the Court's ultimate decision to follow the recommendation of the Board of Governors and suspend respondent from the practice of law for eighteen months. There is ample evidence in the record to establish that a suspension is the appropriate degree of discipline. Complainant respectfully submits, however, that the Court's Opinion should be modified to eliminate any unnecessary confusion and misinterpretation. It would be most helpful to other members of the bar if

the Court were to more fully explain the facts and the law which form the basis for its decision. The potential for confusion and misinterpretation is obvious from the myriad of arguments raised by respondent in his petition for rehearing.

The problem arises in those portions of the Court's Opinion where the Court adopts the decision of the Board but the Opinion goes on to state an analysis of the case which seems to be different than that of the Board. It is unclear whether the Court intends to reach findings of fact and conclusions of law which are different from the Board's decision or whether the Court's Opinion is seeking to articulate an additional or different reason for rejecting respondent's primary defense to the charge.

Complainant respectfully submits that the most appropriate, expeditious and effective way for the Court to modify its Opinion would be to adopt the findings of fact and conclusions of law of the trial commissioner and the Board of Governors. A copy of the trial commissioner's report and the Board's decision are attached to this response as Appendix A and B. The essential thrust of respondent's petition for rehearing is that the Court has resolved all factual issues in his favor, respondent did not represent Dr. Nath in the REBSCS transaction, the Court has only focused on respondent's preparation of a check which is a ministerial act, the Court has not held that respondent has violated any particular provision of the Code of Professional Responsibility, the Court is creating a new rule of ethics which is vague and unsound, and

the Court is seeking to retroactively apply this new rule of ethics against respondent in violation of his right to due process of law. All such objections by respondent can be easily resolved if the Court were to modify its Opinion to follow the recommendations of the trial commissioner and the Board of Governors.

The Court's Opinion should be modified to more fully explain that respondent did represent Nath in the REBSCS investment, that respondent had a conflict of interest in violation of Disciplinary Rules 5-101(A), 5-104(A) and 5-105 of the Code of Professional Responsibility (hereinafter referred to as Code), that respondent did not make a full disclosure of all material facts to Nath as required by the Code and that respondent did not obtain Nath's *informed* consent to waive the conflict as required by the Code. It is very important the Court make it absolutely clear that the discipline imposed on respondent is consistent with the Code and this Court's decision in *Kentucky Bar Association* v. *Roberts,* Ky., 579 S.W.2d 107 (1979).

Complainant has previously filed a brief in the record containing an exhaustive explanation of the Board's position on the facts and the law. Complainant requests the Court to read the brief again. Complainant does not want to impose on the Court's valuable time by repeating what is already stated in complainant's prior brief and the Board's opinion. Complainant does want to take this opportunity to summarize several important points.

Despite respondent's protests to the contrary, the

evidence clearly proves that respondent acted as Dr. Nath's attorney and advisor with respect to the REBSCS investment. Throughout the period of time when respondent was discussing REBSCS with Nath up to and including the date Nath invested the $30,000, respondent was being paid by Nath a monthly retainer fee for personal legal advice and a monthly retainer fee to represent Nath Chartered. Respondent gave legal advice to Nath about forming Nath Holdings to serve as the vehicle for making the investment in REBSCS. Respondent incorporated Nath Holdings for Dr. Nath as his attorney and respondent also opened the bank account for Nath Holdings for the specific purpose of enabling Dr. Nath to invest in REBSCS. The $30,000 which was used to fund Nath Holdings came from Nath Chartered and respondent was general counsel for Nath Chartered on retainer. Respondent wrote out the check for Nath to disburse the $30,000 from Nath Holdings to REBSCS. Respondent's act of writing out the check for Nath's signature was only one of several significant actions that respondent took to advise and assist Nath to accomplish the REBSCS investment. The trial commissioner and the Board found that at the meeting where respondent wrote out the $30,000 check, respondent agreed to prepare for Nath the legal papers necessary to document the transaction between Nath Holdings and REBSCS but respondent never did so. Complainant is amazed that respondent continues to argue he did not represent or advise Nath in this transaction.

In addition to concluding that respondent had a conflict of interest by representing Nath in the REBSCS investment, the Board agreed with the trial commissioner's findings that respondent did not make a full disclosure of all material information to Nath. Respondent did not tell Nath about the nature and full extent of respondent's personal financial interest in REBSCS. Respondent did not disclose to Nath the true financial status of REBSCS. Respondent did not fully and truthfully inform Nath that the bulk of the $30,000 was going to be used to reimburse Towles for out-of-pocket expenses. Instead, respondent falsely told Nath that the $30,000 was not be to used for any purpose except national advertising and to register REBSCS to do businesss in all other states.

The Board concluded that respondent's conduct violated Disciplinary Rules 1-102(A)(4), 5-101(A), 5-105 and 6-101(A)(3) of the Code. The Board's Opinion also cites Ethical Considerations 5-1, 5-2, 5-3, 5-14 and 5-16 of the Code which amplify Disciplinary Rules 5-101(A) and 5-105. The Board based its decision squarely on the Code as it is correctly applied to the facts.

Contrary to respondent's assertions the Board is not in effect recommending to the Court that a new standard of ethical conduct be created and retroactively applied to respondent. The Board's position is that the evidence proves respondent has violated the established Code.

THE BOARD HAS NOT MISLED THE COURT BY USING A NEW STANDARD OF ETHICS AND IMPROPER USE OF EVIDENTIARY PRESUMPTIONS.

Respondent contends that the Board misled the Court into abandoning the Code and adopting "uberrima fides" as the standard to be applied in any business dealings between a lawyer and client. Respondent further contends that the Board improperly used an evidentiary presumption that all attorney-client business dealings are *per se* unethical. Respondent has misinterpreted the Board's decision and these arguments are erroneous.

The Board did not use any evidentiary presumptions taken from civil cases to improperly change or shift the burden of proof. The Board required respondent's guilt to be proven by substantial evidence in accordance with SCR 3.330. The Board cited the civil cases for the purpose of demonstrating that respondent continued to owe fiduciary and ethical duties to Nath because respondent continued to represent Nath. There is nothing improper with the Board citing and relying on the civil cases since this Court has consistently held that bar disciplinary proceedings are civil in nature and are neither criminal nor quasi-criminal. *Kentucky Bar Association* v. *Signer*, Ky., 558 S.W.2d 582 (1977). Furthermore, SCR 3.340 provides that the rules of evidence in civil actions shall apply in disciplinary cases.

Complainant does not advocate and the Board's decision does not say that all business dealings

between a lawyer and clients should be prohibited or presumed to be unethical. A lawyer who enters into a business transaction with a client or a lawyer who has a conflict of interest should comply with Disciplinary Rules 5-101(A), 5-104 and 5-105 of the Code or suffer the consequences of being disciplined for unethical conduct. If a lawyer complies with the Code by obtaining his client's informed consent to waive the conflict and the lawyer continues to provide the client with legal advice and representation in the same subject matter (as respondent did in the present case), then the lawyer must also continue to fulfill the ethical and fiduciary duties of competency, loyalty and honesty that a lawyer owes to each client. Just because a lawyer obtains his client's informed consent to waive a conflict of interest does not mean that the lawyer is thereafter free to continue to represent the client in the same subject matter and be incompetent, disloyal or dishonest. As long as the lawyer provides legal advice and representation to a client, the lawyer owes corresponding, concurrent ethical and fiduciary duties to the client. The civil case law cited by the Board in its decision stand for this proposition. Such a legal standard is entirely consistent with the Code which requires a lawyer as a matter of professional ethics to provide his clients with competent, loyal and honest legal representation on matters which are the subject of the attorney-client relationship.

In its Opinion the Board discussed and rejected respondent's defense that at some point he told Nath

to seek other counsel. On Page 2 of its decision, the Board states:

> While Smith apparently advised Nath to obtain other counsel because of a potential conflict in connection with the transaction, Smith nonetheless proceeded forward with the transaction which unquestionably advanced Towles' and REBSCS's interests, as well as his own, at the expense of Nath. The Board of Governors deems Respondent's arguments to the effect that Smith thereby owed no duty to Nath in connection with the transaction, to be unpersuasive and contrary to prevailing standards in Kentucky regarding the fiducial obligation of a lawyer to his client.

Complainant submits that this is an absolutely correct statement of what the law is and should be in Kentucky. Smith rendered legal advice and services to Nath directly in connection with the REBSCS investment. An attorney-client relationship existed between respondent and Nath in regard to this particular transaction. Smith contends he told Nath to seek other counsel. The Board's Opinion correctly states that regardless of whether Smith told Nath to consult with another lawyer Smith continued ahead with the Nath investment in REBSCS with Nath in the position of being respondent's client. Respondent continued to provide legal advice and services to Nath by respondent incorporating Nath Holdings and respondent setting up the disbursement of the $30,000 to REBSCS. Since respondent continued to act as Nath's attorney in the transaction Smith remained

under an ethical duty to be completely loyal to Nath and to fulfill his fiduciary obligations to protect Nath's interests. Respondent could not and did not relieve himself from all ethical and fiduciary duties owed to his client, Nath, merely by telling Nath to consult with another lawyer.

A client is entitled to repose confidence and trust in the loyalty and integrity of his lawyer. As long as respondent by his actions remained involved in the REBSCS investment as a lawyer assisting Nath, Kentucky law requires and Nath had a right to expect respondent to provide competent, honest, independent and loyal representation which would protect Nath's interests. If respondent was unwilling or unable to provide such candid and loyal legal advice then respondent should not have taken any part whatsoever in the REBSCS investment for Nath. Any disclaimer by respondent to Nath that Nath should obtain other counsel did not lessen respondent's ethical and fiduciary duties owed to Nath when respondent continued to advise and represent Nath. When the Court reads the Board's decision it will see that it was in this context that the Board cited some civil cases, including *Daugherty* v. *Runner,* Ky., App. 581 S.W.2d 12 (1978). These civil cases do not state any legal principles which are not already part of the Code concerning a lawyer's duty to be competent, honest, loyal and vigilent in protecting and promoting the interests of a client. The civil cases cited by the Board do not create a new standard of ethics which goes beyond the existing Code. In a recent case this

Court suspended a lawyer from the practice of law for three years because he had violated his fiduciary duties while serving as the executor of an estate. *Kentucky Bar Association* v. *Berry*, Ky., 626 S.W.2d 632 (1981).

A SUSPENSION IS AN APPROPRIATE DEGREE OF DISCIPLINE.

An eighteen month suspension is not too severe under the facts of the present case. It is helpful to compare respondent's case to the facts in *Kentucky Bar Association* v. *Roberts*, Ky., 579 S.W.2d 107 (1979). Roberts was employed to represent a client in a civil lawsuit. While the first case was in litigation, Roberts was employed to represent a second client in a lawsuit against the first client involving a separate but related cause of action arising out of the same subject matter. Roberts did not disclose the potential conflict of interest to the first client nor obtain a waiver of the conflict from the first client prior to filing a lawsuit against him on behalf of the second client. This Court held that Roberts had violated DR 5-105 of the Code and suspended him for ninety days. The Court found that Roberts' conduct was unintentional and his clients did not suffer any actual harm.

Complainant submits that respondent's misconduct is clearly more serious in nature than Roberts' actions and respondent, therefore, deserves a significantly more severe degree of discipline than the ninety days suspension administered to Roberts.

Respondent had a conflict of interest not only between clients but he had a conflict between himself and a client, Nath. The Board also found that respondent is guilty of neglect and misrepresentation. Furthermore, Roberts' client did not suffer any actual harm while respondent's client, Nath, lost $30,000 and the harm suffered by respondent's client is an aggravating circumstance. Respondent argues that this Court has only found him guilty of poor judgment which is not a sufficient basis to warrant a suspension. However, this Court has found respondent guilty not only of poor judgment but also of having a conflict of interest which resulted in respondent's client losing $30,000. Complainant respectfully submits that the Court should modify its Opinion to cite the Code provisions respondent has violated thereby establishing beyond dispute that respondent is being disciplined for much more than merely poor judgment.

This is a case of first impression in Kentucky in the sense that it involves an unusual fact situation not seen before. This is not to say, however, that the Court is without guidance. If the Court applies the Code to the evidence in the record it can only conclude that respondent has violated the Code. In determining an appropriate degree of discipline the Court can rely on its prior decision in *Roberts*, supra, as a valuable precedent. This Court's suspension of respondent is consistent with the Code and the *Roberts* case. The cases cited by respondent where lawyers have been only reprimanded for poor judgment are in applicable.

Respondent cites the case of *In re Scott*, Ore., 660 P.2d 157 (1983) in support of his argument that his suspension would be too harsh. If this Court is going to look to other jurisdictions for guidance on the appropriate degree of discipline, complainant requests the Court to read the case of *State of Kansas* v. *Callahan*, Kan., 652 P.2d 708 (1982). A copy of the *Callahan* decision is attached hereto as Appendix C. The facts in *Callahan* are similar to the facts in the present case. Callahan was indefinitely suspended.

Respectfully submitted,

/s/ Michael M. Hooper
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IN THE
SUPREME COURT OF KENTUCKY
83-SC-144-KB

KENTUCKY BAR
ASSOCIATION COMPLAINANT

VS. **BRIEF AMICUS CURIAE**

ERIC S. SMITH RESPONDENT

* * * * * * * * * * * * *

STATEMENT OF PURPOSE AND ISSUES

This brief *amicus curiae* is submitted by the undersigned[1] as a fervent plea that this Court clarify and modify its opinion herein so as to provide clearcut guidance to those of us who want—and try—to practice law in Kentucky ethically, honorably and honestly. That clear guidance is not now provided by the published opinion herein, and most certainly would not be provided should this Court adopt the Bar Association's proposal in its Response to Petition for Rehearing and Modification. (Response Brief) While the undersigned agree with the Response Brief that the Court's opinion herein should be modified, the position of the Complainant that the opinion of the Board of Governors should be substituted for the

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1. The undersigned submits this brief with the participation and on behalf of the practicing attorneys listed in Exhibit 1.

Court's original opinion would not solve the problems presented by the published opinion.

The dilemma presented to the practitioner by the Court's published opinion and by the Board's opinion is stark: How can or does an ethical attorney protect himself and his clients in potential conflict of interest situations if he cannot safely rely on the "disclosure and consent" procedure now prescribed by the Disciplinary Rules?

ARGUMENT

I
THE COURT SHOULD CLARIFY ITS OPINION

Most practicing lawyers find themselves confronted with "conflict of interest" situations in the course of their professional careers. No sensible lawyer seeks these situations. They invariably spring forth from unsought circumstances outside the control of the lawyer. The ethical guideline for resolving those situations hitherto has been full disclosure of the conflicting interests to the client, an invitation—more likely advice—to seek other representation, express refusal to represent the client in the transaction giving rise to the conflict and reliance on the client's consent to the lawyer's participation before undertaking to perform any legal services in the transaction. That protective procedure is specified

by Canon 5.[2] The Court's opinion herein seems to find that Respondent complied with the procedure in this case and yet severe professional sanctions were imposed.

The opinion herein states that Respondent's express refusal to represent the complaining client in the particular transaction, while representing him or his corporations "generally," is a "nondefense" to imposition of professional sanctions; and, further, that full disclosure to the client of the "conflicting interest"—stemming from both representation of another client and/or the attorney's own personal economic interest—followed, apparently, by the client's consent being given for the lawyer to participate in the transaction is "beside the point". The

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2. DR5-101(A) prohibits a lawyer from accepting employment if his professional judgment on behalf of the client "will be or reasonably may be affected by his own financial, business, property, or personal interests," *except with the consent of the client after full disclosure.* (emphasis added) DR5-104(A) prohibits a lawyer from entering into a business transaction with a client "if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment" for the client's protection, *unless the client has consented after full disclosure.* (emphasis added) DR5-105 prohibits a lawyer from accepting employment or continuing multiple employment if his independent professional judgment "will be or is likely to be adversely affected" by the employment or is "likely to involve him in representing differing interests", unless it is obvious that he can adequately represent the differing interests "*and if each consents to the representation after full disclosure* of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." (emphasis added)

Court then finds that ministerial preparation of a check at the direction of the client constitutes sanctionable participation in "a transaction whereby one client lent money to another of respondent's clients, a corporation in which respondent had an interest." Having thus nullified or ignored or disregarded the "disclosure and consent" procedure, this Court then holds that Respondent breached the requirement of "utmost good faith and fidelity to a client by placing himself in a conflict of interest." Without ever specifying what Disciplinary Rules were violated by Respondent's actions, the Court imposes an eighteen-month suspension for this infraction.

The opinion may thus be read to hold both that Respondent did and did not "represent" the complaining client in the transaction, and did fully disclose and obtain consent but it was irrelevant; and the opinion may be understood to rest *on* the Disciplinary Rules, or on an equitable standard *outside* the Disciplinary Rules, or on some new unarticulated principle. The opinion of the Board of Governors of the Kentucky Bar Association, which the Court states it adopts, suffers from the same ambiguities.

For the future guidance of Kentucky practicing lawyers, the Court should modify its opinion herein so as clearly to state the facts and applicable ethical standards on which it rests its ruling.

II
RESPONDENT APPEARS TO HAVE COMPLIED WITH THE CANONS

Most practing lawyers believe that when an actual or predictable conflict of interest situation arises, whether they represent a client "generally" or "in the particular transaction," they should fully disclose any conflicting interest arising from representation of another client with such interests or because of their own personal or economic interests, and give the client his free choice and opportunity to seek other counsel to represent him in the particular transaction, or otherwise consent to the lawyer's continued participation therein notwithstanding the conflict of interest. The Disciplinary Rules expressly require that of the lawyer[3], and thus expressly authorize him to

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3. Technically speaking, the Disciplinary Rules do not automatically require this disclosure and consent procedure in every conflict of interest situation. DR5-101(A) does not absolutely require it unless the lawyer's professional judgment "will be or reasonably may be" affected by his own personal interest. DR5-104(A) does not flatly prohibit him from entering into a business transaction with a client unless "they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client . . . ." DR5-105 prohibits accepting or continuing multiple representation only if the exercise of the lawyer's professional judgment "will be or is likely to be adversely affected . . . or if it would be likely to involve him in representing differing interests . . . ." Ethical Considerations 5-2, 5-3, 5-14, 5-15, 5-16, 5-17, 5-18 and 5-19 explain that these rules are predicated upon the common sense possibility that the disclosure and consent re-

(continued on page 95a)

continue his participation in the transaction after having disclosed and obtained consent. The Disciplinary Rules are essentially silent concerning the lawyer's ethical obligations in the transaction *after* he has disclosed and obtained the client's consent.[4]

(footnote 3, continued from page 94a)

quirement should be imposed only on an existing or predictable conflict of interest severe enough to "affect", or "reasonably probable" or "likely" to affect, exercise of the lawyer's professional judgment on behalf of the client. They recognize that some conflict of interest situations do not require disclosure and consent. EC5-15 states this distinction expressly and indicates that a lawyer may properly represent multiple clients with "potentially differing interests in matters not involving litigation", apparently without disclosure and consent. Notwithstanding these common sense limitations on the rules, most practicing lawyers, like Respondent here, routinely disclose existing or potential conflicts, however slight, and obtain the client's consent to their continued participation in the transaction. Although the Opinion does not expressly find that the conflict of interest situation here involved required disclosure and consent within the meaning of Canon 5, this brief assumes that the Court impliedly so found, and proceeds on that assumption.

4. The opinion of the Board of Governors, p. 5, states that the Disciplinary Rules seem to provide that "almost anything goes" *after* disclosure and consent. *Amicus* disagrees. There are several express prohibitions noted in the Ethical Considerations. EC5-2 states he should "refrain from acquiring a property right or assuming a position that would tend" to impair his judgment regarding the client's protection. EC5-3 prohibits a lawyer from persuading his client to allow him to invest "in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an 'enterprise' in which the lawyer is interested." EC5-15 notes a lawyer should never represent in litigation multiple clients with differing interests. Beyond these few express prohibitions, however, neither the rules nor the

(continued on page 96a)

The Court's opinion herein seems to find, or concede, that Respondent did fully disclose both his representation of Towles and REBSCS and his ownership interest in REBSCS and obtain the complaining clients' consent to act as he did in the loan transaction.[5] The issue to the undersigned thus becomes

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(footnote 4, continued from page 95a)

Ethical Considerations offer express guidance on the lawyer's affirmative ethical obligations when he acts in conflict of interest situations with the client's consent. *Amicus* believes and takes the position herein that aside from these prohibitions after disclosure and consent the Canons continue to govern the lawyer's conduct as he undertakes thereafter to serve the interests of both clients as they apply in the post-consent situation. As discussed more fully *infra* at pp. 8-9, 14 and 15, the Trial Commissioner found that Respondent did not violate any of the express prohibitions. Report of Trial Commissioner, pp. 8, 9 and 13, and *Amicus* contends that Respondent appears to have otherwise complied with the canons in the post-consent situation here.

5. Respondent and the Bar Association hotly contest over whether Respondent was "representing" Nath when the loan/investment check was written. The position taken by *Amicus* here is that the Disciplinary Rules authorized Respondent to "participate" in the transaction without fully "representing" either Nath or Towles by virtue of the disclosure and consent. The Bar Association in its Response Brief contends that Respondent did not fully disclose nor obtain Nath's "informed" consent; however, to adopt that position the Court would now have to reverse its prior finding and disregard the findings of both the Trial Commissioner and the Board of Governors on this point. It seems clear that from the beginning Nath knew that Respondent had an option to purchase an interest in REBSCS and that he represented both Towles and his company. Both the Opinion of the Board of Governors, page 2, and the Trial Commissioner found as a fact that "Smith did advise Nath to obtain

(continued on page 97a)

what, precisely, should the lawyer have done in this dual conflict of interest situation to avoid an ethical violation.

A. RESPONDENT COMMITTED NO VIOLATIONS BY PARTICIPATING IN A TRANSACTION BETWEEN MULTIPLE CLIENTS.

Having disclosed that he also represented the intended borrower of Nath's funds and obtained the client's consent, Respondent was in the position of "generally" representing multiple clients with "potentially differing interests" in a transaction which is not in litigation. EC5-15 states:

> [T]here are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litiga-

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(footnote 5, continued from page 96a)

other counsel because of the possible conflict of interest between Towles and Nath and Smith and Nath." Report of Trial Commissioner, page 13. The Trial Commissioner also found as a fact that "the evidence clearly indicates that Nath was furnished detailed information regarding the workings of REBSCS and even information regarding prospective purchasers of stock in REBSCS." Report of Trial Commissioner, page 14. There would thus seem to be no factual basis for the Court now to find that Respondent did not disclose the conflict of interest to the client. The client's consent to Respondent's participation in the transaction would seem to have been given by Nath requesting that Respondent explain REBSCS corporation to his wife, by commissioning Respondent to form Nath Holdings, Inc. *inter alia* for the purpose of "investing" in REBSCS, and by directing Respondent to prepare the "loan" check. Report of Trial Commissioner, pp. 10, 11, 12 and 13.

> tion. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment *on behalf of each client*. . . ." (emphasis added)

EC5-17 notes that it is essentially a case-by-case determination whether a lawyer can fairly and adequately protect the interests of multiple clients in a specific non-litigation situation.[6]

From these guidelines most practicing lawyers understand that in these situations they have the ethical obligation to serve the interests of *both* clients to the extent they ethically can, and that evaluation by the Bar and this Court of the lawyer's performance of these obligations, made after the fact, will be made on the circumstances of that case and the obligations he owed both clients—not just the complaining one. Further, they feel that sanctions should not be based on *post hac* determinations that they exercised "poor judgment" either in ever agreeing to "serve the interests" of both clients in the first place, or in the way

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6. The Court's choice of language is very confusing when it states that "[i]n *placing* himself in this position" and "a lawyer must . . . not *place* himself . . . in position of conflict of interest. . .". (emphasis added) If this language means that a lawyer can *never* undertake to serve the potentially differing interests of multiple clients, notwithstanding disclosure and consent, it represents a change in the Disciplinary Rules as interpreted by the Ethical Considerations. If the language refers to the other dimension of the situation—the fact Respondent owned an interest in REBSCS—it is equally confusing.

they served the interest of the complaining one, and that in such determinations "all doubts [should] be resolved in favor" of the lawyer. *Kentucky State Bar Ass'n.* v. *Taylor,* Ky., 482 S.W.2d 574, 583 (1972).

The Court's opinion does not specify precisely what ethical obligation Respondent failed to discharge to Nath. The Complainant in its Response Brief asserts generally that Respondent failed to make full disclosure of all material information to Nath. Even if correct, this would seem to bear on whether the client's consent was "informed", and not on Respondent's ethical obligations *after* the client's consent was given. Holding it was "beside the point" whether Nath knew that Respondent owned an interest in REBSCS or that Towles planned to reimburse himself $10,000.00 in expenses from Nath's loan, the language of the opinion thus indicates that Respondent either told Nath or had no obligation to tell him those facts. The Report of the Trial Commissioner finds that Nath knew the former fact, and was not told the latter by Respondent. In either event, it would not seem to be a violation of any Disciplinary Rule even if he did not tell him what Towles intended to do with the funds.[7]

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7. None of the opinions previously rendered herein by this Court, the Board of Governors or the Trial Commissioner state that Towles reimbursement of $10,000.00 was improper or not related to "national advertising" or licensing REBSCS in other

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The Complainant in its Response Brief also suggests that the lawyer "should not have taken any part whatsoever in the REBSCS investment for Nath." But the very services the lawyer rendered to his client here—incorporating Nath Holding, Inc. and preparing the loan check as directed by the client—are ministerial services most practicing lawyers would have performed for either or both of their clients in these circumstances. If it is now their "fiducial obligation" to refuse to perform these routine services, and to take no part "whatsoever" in loan transactions between two clients they represent "generally", then an apparent change in the Disciplinary Rules has occurred. This new ethical obligation will also affect lawyers preparing checks for both parties in loan closings, lawyers representing banks whose other clients borrow money from the bank—possibly executing notes and mortgage forms drafted by him, lawyers forming corporations for their clients to deal with each other, or lawyers acting for multiple parties in countless other contexts including *inter alia* drawing joint wills, estate planning, advising corporate of-

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(footnote 7, continued from page 99a)

states, the expenses Nath apparently was told his loan would be used to pay. For all that appears in the various findings of fact, the reimbursement was for a *bona fide* expenditure by Towles for those purposes. The Bar Association in its Response Brief states Respondent "falsely" told Nath his loan would be used for those purposes but the Trial Commissioner did not find that statement was false and its truth or falsity would seem finally to depend upon precisely what expenses Towles was reimbursed.

ficers and directors of corporations which they also represent, forming family corporations, and filing uncontested divorces.

The main problem with imposing these broad suggestions of the lawyer's ethical obligations to one client in multiple client situations is that they may force him into violations of his ethical obligations to the other client. If he is obligated generally by Canon 5 to disclose to one client information learned from or about or the "confidences" of the other, he may be forced into violating Canon 4.[8] If he is to reveal some information but not other information — by what

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8. "Confidence" means information protected by the attorney-client privilege under DR4-101(A). A lawyer is prohibited from revealing a confidence or "us[ing] a confidence to the disadvantage of the client . . . [or] for the advantage . . . of a third person" without the protected client's consent. DR4-101(B). Without that consent, he is authorized only to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." DR4-101(C) Under DR 7-102(B)(1) he must reveal information relating to a client's "fraud" if the client refuses to do so himself. This nondisclosure obligation is set forth in even stronger terms in the American Bar Association "Model Rules of Professional Conduct", August 2, 1983, Rule 1.6 and Rule 1.8(b), where it is made applicable to "information relating to representation of a client" obtained from whatever source. While the Model Rules have not been adopted by this Court, reference to them here and throughout this brief is for the purpose of illustrating the current position of the American Bar Association on the point. The information about Towles reimbursement intention would appear to be a confidence, and not one relating to an intention to commit a crime. There is no finding in this case that the Towles reimbursement was a "fraud" on Nath.

criteria does he choose? If the lawyer is obligated by Canon 5 to have nothing whatsoever to do with a specific transaction between two clients he represents "generally", he runs the risk of violating Canon 1, Canon 6, and Canon 7, not to mention his practical obligation to be worthy of his hire. If he may permissibly perform some types of legal services for both but not others — what are they?

The ethical practicing lawyer serving consenting multiple clients who have only potentially differing interests in a non-litigation context is entitled to clearer guidance as to his ethical obligations than the Court's broad statements that he should "not place himself or herself in position of conflict of interest such as to bring the bench and bar into disrepute" or, the Bar Association's suggestions that he should "have nothing whatsoever to do with the transaction."

B. RESPONDENT COMMITTED NO VIOLATIONS OF THE RULES IN DEALING WITH THE CLIENT IN A MATTER INVOLVING HIS OWN ECONOMIC INTEREST.

Most practicing lawyers believe that the disclosure and consent procedure is also available to them in situations where, through no solicitation by them, their own pre-existing economic interests become entangled with those of a client. They further believe that their ethical obligations to the client *after* they have fully disclosed the conflict of interest and the client has given consent to their continued par-

ticipation in the transaction require them to refrain from overreaching or profiting personally at the client's expense or injuring the client, but do not extend to renouncing their own economic interest or guaranteeing that the client profits from the transaction.

Yet under the Court's opinion herein an attorney is heavily penalized apparently because he had an option to acquire a 25% interest in a corporation to which another corporation he formed for another client later made a loan, and he prepared the loan check at the client's direction, notwithstanding prior disclosure and consent.[9]

Literally speaking, respondent here did not "enter into a business transaction with a client" as pro-

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9. The Court's opinion herein does not make clear whether Respondent's economic "interest" in REBSCS is an independent ground for the ruling or merely a fact complicating the multiple client situation. However, if it was "beside the point" whether Nath knew about Respondent's option to purchase an interst in REBSCS then it would seem similarly irrelevant whether that interest was 5% or 25%, or was coupled with a contractual right to receive 5% of the company's "gross earnings", restrict dilution and inspect the books. (Apparently, Respondent never exercised his option to purchase any interest in REBSCS nor did the company ever have any "gross earnings".). Finally, there was no violation of the prohibitions of EC5-2 because Respondent did not "acquire" his REBSCS interest *after* commencing his representation of Nath "generally"; instead, the sequence was reversed. It seems equally clear that Respondent did not attempt to persuade Nath to invest in REBSCS, as prohibited by EC5-3, and instead attempted to persuade him otherwise. Report of the Trial Commissioner, page 8.

hibited by DR5-104(A). Whether finally characterized as a "loan" or "investment", the funds transfered were from a corporation to a corporation, and even if Nath Holding Ltd. be deemed the *alter ego* of Nath it cannot be fairly said that REBSCS was Respondent's *alter ego.* Further, DR5-104(A) prohibits the lawyer from entering into such business transaction only *if* the lawyer and client "have differing interests therein" *and if* the client expects the lawyer to exercise his professional judgment therein for the protection of the client. . . ." Notwithstanding these technicalities and assuming this loan or investment comes within DR5-104(A), it is not clear what ethical transgression occurred. The lawyer did not "acquire property rights" adverse to the client nor try to persuade the client to invest in the corporation as prohibited by EC5-3, nor "assume a position" that tended to make him less protective of the client's rights, as prohibited by EC5-2, *after* the disclosure and consent. He owned his interest in REBSCS before commencing to represent Nath. He did not profit personally at the client's expense; nor did he engage in any malpractice to the client's injury. Yet he stands suspended from conducting the practice of law for eighteen months. It is not at all clear why this should be so. Most troubling of all is that there is no clear guidance as to how the same outcome can be avoided by another lawyer who finds himself in the same position and who wishes to live and practice law ethically.

Many lawyers acquire economic interests in property, corporations or business ventures which subsequently attract the attention of their other clients. Oftentimes they receive the interest in the form of a fee, as did Respondent here, and continue to represent the entity in which they hold an economic interest. The ruling here goes far toward holding that the lawyer thereby becomes an insurer of the economic success of any client who *subsequently* loans or invests money in the entity.[10]

An equally important dimension to the problem created by the ruling here is guidance as to a lawyer's ethical obligations, once having "placed himself or herself" into this conflict situation. Is he now obligated to renounce or transfer his economic interest and withdraw from representation of the business entity? Even should he do so, EC4-6 would require that he "preserve the confidences" of his former client, and he would be prohibited by Canon 5 and Canon 9 from representing the second client. See

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10. While the lawyer can be loosely said to have thus "placed" himself in a conflict of interest position, the Court offers no guidance as to how he could have avoided the situation. There is no indication in this case that Respondent at the time he acquired his interest in REBSCS could or should have foreseen Nath's subsequent interest in loaning or investing in the company. The clear implication of the Court's ruling—and the Complainant's position here—is that the only safe course of action is for the attorney never to "place" himself in respondent's position by acquiring the economic interest at all. The Canons do not now require that course of action and probably could not.

Rule 1.9 of the American Bar Association "Model Rules of Professional Conduct," August 2, 1983. The Complainant's suggestion that he have nothing "whatsoever" to do with the transaction runs afoul both of common sense, his own economic interest, and Canons 1, 6 and 7. Further, it does not adequately address the situation where the lawyer's economic interest in the business entity is threatened by the actions of the client. Surely there is no ethical obligation to avoid all participation "whatsoever" in the transaction if the client's action will or may harm both the entity and the lawyer's economic interest.

The Court should modify its opinion herein to make clear that after the lawyer has disclosed his "own financial, business, property, or personal interests," declined to represent the client, and the client has consented to the lawyer's participation in the transaction that the lawyer has not ethically guaranteed that the client will profit from the transaction, but that the lawyer will remain subject to forfeit any personal enrichment at the client's expense gained by any breach of his fiduciary duty and be subject to personal liability for any injury to the client by reason of malpractice.[11] It is important to maintain a

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11. There is indication in the record of this proceeding before the Board of Governors that Nath may have filed his Complaint herein for the purpose of coercing Respondent to reimburse him for his loss in the transaction upon the advice of his accountant. While this may have been reprehensible behavior by the com-

(continued on page 107a)

distinction between those situations in which an attorney may have obligations to a client imposed by law, as would any other person, and those situations in which an attorney has ethical obligations to a client imposed by our profession.[12]

C. RESPONDENT VIOLATED NO DISCIPLINARY RULES BY FAILING TO DOCUMENT THE "LOAN."

The opinion suggests, but does not clearly hold, that Respondent acted irresponsibly by failing to document the "unsecured loan" transaction because "[T]here was no security." The Complainant similarly charged that Respondent "failed and neglected to

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(footnote 11, continued from page 106a)

plaining client, neither he nor the accountant is subject to the Disciplinary Rules. The Court notes in its opinion that Nath "lost any hope of the loan being repaid," thereby intimating what is not borne out by the record. Nath apparently has never directly sought recovery of his "loan" from REBSCS or Towles, nor sued Respondent for malpractice.

12. The Disciplinary Rules do not expressly address this point. However, the Preamble to the American Bar Association "Model Rules of Professional Conduct," August 2, 1983, states: "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . They (the Rules) are not designed to be a basis for civil liability. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." The reverse proposition is, perhaps, even more important: violations of legal or ethical obligations imposed by other authorities are not a basis for imposition of the Bar's professional sanctions by the Court unless they also constitute a violation of the Disciplinary Rules. *In Re Wehrman*, Ky., 327 S.W.2d 743 (1959).

prepare a promissory note or any other legal documents necessary to evidence and secure said loan," in violation of DR 6-101(A)(3). Aside from the fact that the "loan" could not be both a secured and an unsecured one, Nath and Towles apparently never agreed on the precise characterization of the loan.[13] The Report of Trial Commissioner notes that while no documentation was ever prepared by Respondent, ". . . it appears to the Trial Commissioner that there are mitigating factors in this charge, in that no agreement or understanding was made as to "what this (transaction) was." Report of Trial Commissioner, p. 14.

Most practicing lawyers feel that when they are deputed by the parties to a transaction to prepare documentation of it there must first be agreement by the parties on the essential terms of the matter. The

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13. The Trial Commissioner found that Nath originally wanted to invest in REBSCS and was told by Respondent no stock of REBSCS was available for sale to him. He was later told by Respondent in December, 1979, that Towles now wished to sell stock in REBSCS. Report of Trial Commissioner, pp. 8, 10. Nath prepared a check himself on February 11, 1979, ". . . as a loan in exchange for convertible debenture" which could be converted within five years into 10% of the stock of REBSCS. At the February 15th meeting, however, Nath refused to make an "investment" and required the second check to be a "loan," yet "still thought he would get ten percent (10%) of the stock in REBSCS." Report of Trial Commissioner, pp. 11, 12. It is not surprising that this ambiguous transaction never became documented. Nath now appears to want neither stock in REBSCS nor a debt claim against REBSCS.

lawyer is not at liberty to decide for them, nor to adopt one or the other's version and document the transaction with that version so as to bind the other without his agreement. Where the parties themselves have not decided whether a given transaction is a loan of money, purchase of stock, or a mixture of the two, the lawyer who is to draw the instruments necessary to evidence the transaction cannot act. Respondent should not be punished for a violation of DR 6-101(A)(3) for failing to draft a promissory note, rather than a stock purchase agreement or subordinated debenture in this situation.

In the final analysis, it does not appear that the complaining client has been injured or prejudiced by Respondent's failure to draft a promissory note or other document. Apparently, no party to the transaction denies that Nath loaned $30,000 to REBSCS, nor has Nath been prejudiced in any way by the fact that no note was prepared by Respondent. If Nath has "lost any hope of the loan being repaid" it is not because there is no promissory note.

III
THE PENALTY IS EXCESSIVE

The penalty imposed here on the lawyer is excessive given the circumstances of the case. By this Court's characterization this is a case of "first impression" wherein Respondent is said to have exercised "poor judgment". It is manifestly unjust to impose

the severe penalty of eighteen months' suspension in these circumstances. This is particularly true when there was no clear prior warning from the Disciplinary Rules that what Respondent was doing would be considered wrong.

The Respondent was originally charged by the Bar Association with violations of specified provisions of the Code of Professional Responsibility. His disciplinary hearing was conducted on those charges. This Court's opinion, however, suspended him for a different reason altogether. The Board of Governors recommended sanctions because he allegedly violated his "fiducial duties" and this Court seems to have adopted that rationale for its ruling. There has yet to be specified which Disciplinary Rules he violated. That does not meet the constitutional requirements of notice and an opportunity to be heard, and thus, imposing any sanction violates respondent's right to procedural due process. *In Re Ruffalo,* 390 US 544 (1968).

Dispensing punishment on the basis of a standard of ethical behavior outside the Disciplinary Rules is a drastic departure from this Court's prior position. *Kentucky State Bar Ass'n.* v. *First Fed. Savings & Loan Ass'n.,* Ky., 342 S.W.2d 297 (1961); *In Re Wehrman,* Ky., 327 S.W.2d 743 (1959).[14]

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14. The *First Federal* case also dealt with a case of first impression. The Court refused to impose sanctions in that situation,

(continued on page 111a)

This Court is also departing from its prior position in situations characterized as "bad" or "poor" judgment on the part of attorneys. *Duffin* v. *Commonwealth*, Ky., 208 Ky., 452 271 S.W. 555 (1925); *Kentucky State Bar Ass'n* v. *Jones*, Ky., 372 S.W.2d 794 (1963). He seems to have been suspended from the practice of law on the basis of his own testimony that he "prepared a check . . . in a transaction whereby one client lent money to another of respondent's clients . . . in which [he] had an interest." Prior to this case, poor judgment, without more, has never been a sufficient basis for suspension in this state.

Further, this sanction is unbelievably harsh. It sets an alarming precedent to all practicing attorneys. With no prior warning from the published Rules, no notice of the ultimate charge and without specification of his ethical violations, this attorney has been suspended for eighteen months—a *de facto* disbarment. If this case is to be a vehicle for promulgation of a new, stricter ethical rule in the state, Respondent should not have his law practice essentially destroyed as an object lesson to the Bar in order to underscore the Court's commitment to the new requirement.

(footnote 14, continued from page 110a)

as should be the case here. The Court reserved sanctions for future violations—once the rule is known and in effect. *Wehrman* holds that a lawyer should not have professional sanctions imposed on him for reprehensible behavior under other standards unless it also constitutes a violation of the Disciplinary Rules.

CONCLUSION

The decision in the present case determines more than the fate of the Respondent. It appears to promulgate new ethical requirements and change the existing Disciplinary Rules.

Respondent appears to have violated no Disciplinary Rules. He complied with the Canons regarding full disclosure and consent and relied on that procedure—as do we all. To then be informed by this Court that such compliance is a "non-defense," is "beside the point," and amounted to "poor judgment" leaves all lawyers vulnerable. Many members of the bar could easily find themselves in the same position as Respondent did here, and, in the normal course of law practice, many will find themselves so "placed" in the future. If they cannot rely upon full disclosure and the client's consent they must have further guidance as to how to protect themselves from disappointed clients.

Confronted with this confusing prospect, all practicing attorneys have a strong interest in the outcome of this case. *Amicus* feel that Respondent was wrongly suspended. This Court has stated in dealing with a reinstatement case where other attorneys rallied to the support of the applicant:

> The Courts must repose a great deal of confidence in the bar, and when its members are united upon any such proposition that so directly affects the

> profession as the reinstatement of a disbarred attorney, that recommendation cannot be disregarded.

In Re Stump, Ky., 114 S.W.2d 1094, 1100 (1938). The undersigned are united in the proposition that suspension for eighteen months is not appropriate in the present situation.

For all the reasons hereinabove stated, this Court should grant rehearing, modify its opinion herein to specify the precise ethical standards applicable, and dismiss all charges against Respondent.

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SUPREME COURT OF KENTUCKY
83-SC-144-KB

KENTUCKY BAR ASSOCIATION, COMPLAINANT

v. ORIGINAL ACTION IN SUPREME COURT

ERIC S. SMITH, RESPONDENT

RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE TO PETITION FOR REHEARING AND MODIFICATION

Respectfully submitted,

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I hereby certify that a true copy of the foregoing Reply has been served upon the Kentucky Bar Association by causing a true copy hereof to be hand delivered to Hon. Michael M. Hooper, Assistant Director, Kentucky Bar Association, at his offices at West Main at Kentucky River, in Frankfort, Kentucky 40601, on this the 22 day of February, 1984.

/s/ Ben L. Kessinger, Jr.
BEN L. KESSINGER, JR.

SUPREME COURT OF KENTUCKY
83-SC-144-KB

KENTUCKY BAR ASSOCIATION, COMPLAINANT

v. ORIGINAL ACTION IN SUPREME COURT

ERIC S. SMITH, RESPONDENT

RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE TO PETITION FOR REHEARING AND MODIFICATION

MAY IT PLEASE THE COURT:

It is gratifying to see that Complainant has now joined Respondent in requesting a modification of this Court's Opinion. Such a modification is necessary, not

only to eliminate the "unnecessary confusion" complained of by Complainant, but just as importantly to remedy a gross injustice to this young attorney.

Unfortunately, Complainant's Response does little to alleviate the "confusion," and nothing to correct the unjust result. On the contrary, Complainant's simplistic suggestion that Respondent's objections "can be easily resolved" compels this Reply.

Complainant urges this Court to avoid Respondent's Petition by renouncing its existing factual findings. Complainant suggests that this Court should now go back and find what it declined to conclude in its previous review - that Respondent represented Nath in *this transaction.* In the absence of such a new and inconsistent finding, Respondent cannot properly be found guilty of any ethical violation. Indeed, Complainant's Response effectively admits that the existing factual findings of this Court *do not* demonstrate that Respondent violated any established ethical rules.

Complainant's Response simply urges this Court to reread its Brief. However, the repetitious "summary" of the illogical conclusions in that Brief, which Complainant again offers as "fact" (without citation to the Record), is neither new or persuasive. We are confident this Court does not now intend to abdicate its role as an *independent* fact finder, and simply "rubber stamp" the Board of Governors' recommendations or accept, without question, Complainant's er-

roneous interpretation of the Record. On the contrary, this Court has already announced that its existing factual findings were made after "... an *independent* review of the record, the transcript and ... the briefs and arguments of the parties" (Opinion, p. 1, our emphasis).

This Court declined to make the "factual" findings which Complainant again urges. Acknowledging the conflicting testimony, this Court indicated reliance only upon those facts which it determined to be reliably proven, and thus properly resolved all significant doubts in favor of Respondent.[1] Indeed, this Court has made the following findings (all contrary to Complainant's allegations):

1. Respondent represented REBSCS and Nath "generally" (Opinion, p. 3), but this Court *did not* find Respondent to have represented either with regard to this particular transaction;

2. Nath Holdings, Inc. was incorporated by the Respondent "to take care of some other interests of Nath" (Opinion, p. 1), and *not*, as

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1. This procedural principle of resolving all doubts in favor of Respondent has been *consistently* adhered to by this Court, and reflects a traditional balancing of the interests of society and the accused attorney. See *K.B.A.* Franklin, Ky., 534 S.W.2d 459 (1976); *K.S.B.A.* v. *Taylor*, Ky., 482 S.W.2d 574 (1972); and, *Tudor* v. *Commonwealth*, Ky., 84 S.W. 522 (1905). This Court has consistently held that no attorney should be deprived of his good name, standing, reputation, and means of livelihood, upon ambiguous facts and contradictory testimony. *Tudor*, *supra*.

Complainant suggests, solely to further Nath's loan to REBSCS;[2]

3. "(b)eing on the lookout for business deals, Dr. Nath became interested" in REBSCS (Opinion, p. 2), and *not* because Respondent urged Nath to invest;

4. "(d)ue to personal problems experienced by Towles, REBSCS became moribund, and Dr. Nath lost any hope of the loan being repaid" (Opinion, pp. 2-3), and *not*, as Complainant implies, that Nath's alleged loss somehow resulted from Respondent's actions, or alleged

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2. Complainant makes much of the facts that Respondent incorporated Nath Holdings, opened a bank account for Nath Holdings, and wrote the check whereby Nath Holdings loaned money to REBSCS. These actions, however, do not prove representation of Nath, in Nath's dealings with REBSCS. On the contrary, formation of a general purpose corporation through which to handle such diverse interests as race horse boarding, pub or bar operations, and other business interests (See Smith, Transcript, pp. 324-29), is not significant, since it did not involve any dealings or agreement between Towles and Nath. It was, as was the opening of the bank account, a service performed for Nath alone, and involved no conflict. The writing of the check was no different. That clerical act was performed at Nath's request and according to his own directions, and involved no advice from Respondent (See Nath, Transcript, pp. 40-42; Trial Commissioner Report, p. 12). Indeed it is clear from the Record that Nath's decision to loan money to REBSCS was made after consultation with his accountant Eakle (and without advice from Respondent) long *before* these limited ministerial acts (See Nath, Transcript, pp. 75-77; Eakle, Transcript, pp. 188-90, 192-93; and, Smith, Transcript, pp. 320-23, 510-12).

conflict of interest;[3] and, finally,

5. This Court could not be sure from the evidence that any misrepresentation was made by Respondent (Opinion, p. 4), *thereby effectively holding that no misrepresentation had been proven.*[4]

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3. See page 10 of Complainant's Response. This Court's existing findings clearly indicate that the problems which caused REBSCS to become dormant were not in any way foreseeable by Respondent. Further, there is no showing that Nath (or more precisely Nath Holdings, Inc.) lost $30,000.00. The evidence is uncontradicted that Respondent is not only solvent but carried liability insurance. Towles is also solvent. More significantly, neither Nath nor anyone else on Nath Holdings, Inc.'s behalf ever made any *demand for payment of the loan on REBSCS or Towles.* See Towles, Transcript, pp. 601-603, 622-24, 645-47.

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4. Complainant, at page 4 of its Response, however, variously alleges that Respondent "... did not tell Nath about the ... full extent of respondent's personal financial interest in REBSCS"; "... falsely told Nath that the $30,000.00 was not to be used for any purposes except national advertising and to register REBSCS to do business in all other states"; "... did not disclose to Nath the true financial status of REBSCS"; and, in summary "... did not make a full disclosure of all material information to Nath." These allegations are simply not substantiated, and are disproven by the following testimony:

(a) Respondent testified that he completely informed Nath of the extent of his interest in REBSCS (See Smith, Transcript, pp. 314-15). More significantly, Eakle (Nath's accountant) testified that Respondent had informed him of Smith's 25% option interest in the fall of 1979, *months before Nath's decision to loan money to REBSCS* (See Eakle, Transcript, p. 213). Curiously, although Nath testified that he knew from the beginning that Respondent had at least a 5% interest in REBSCS (See Nath, Transcript, p. 53), and Eakle testified he knew of Respondent's 25% option interest, Nath *misled* his new attorney, Irvin, by

(continued on page 123a)

Complainant's argument that Respondent can be suspended under the existing rules of this Court rests entirely upon its unproven and illogical contention that Respondent represented Dr. Nath with respect to the REBSCS loan. This erroneous contention finds no support in the Report of the Trial Commissioner or the Opinion of the Board of Governors. Indeed, Complainant's reliance upon the following portion of the Board of Governors' Opinion is clearly misplaced:

(footnote 4, continued from page 122a)

feigning ignorance of this fact (See Irvin, Transcript, p. 485). Nath's lack of candor with his own attorney, must be considered in assessing his credibility.

(b) As to Towles' planned reimbursement, not only did Respondent testify that he informed Nath of this, Towles testified he informed Nath of his planned reimbursement as well. (See Smith, Transcript, pp. 332-33, 359 and 449; and, Towles, Transcript, pp. 586-88).

(c) Further, Towles also testified that he informed Nath of the financial condition of REBSCS (See Towles, Transcript, pp. 586-88).

(d) Finally, as to whether a "full disclosure" was made by Respondent, it is clear that Nath knew of Respondent's interest in REBSCS; understood the conflict of interest involved (See Irvin, Transcript, pp. 483-84); knew of REBSCS's financial condition; and, in fact had been informed of all material facts. The Trial Commissioner confirmed this when he found that "... *the evidence clearly indicates that Nath was furnished detailed information regarding the workings of REBSCS .... This information had to come from Smith.*" Trial Commissioner's Report, p. 14. Complainant's allegations are clearly unsubstantiated. Nath's testimony, the sole source of these allegations, is not only uncorroborated, it is contradicted and disproven on every point. Surely Nath's testimony cannot provide a reliable basis for any disciplinary sanction against Respondent.

> While Smith apparently advised Nath to obtain other counsel because of a potential conflict in connection with the transaction, Smith nonetheless proceeded forward with the transaction . . . (Board's Opinion, p. 2).

This finding falls far short of stating that Respondent proceeded with the transaction "as attorney for Nath," or that Respondent "proceeded to represent Nath in the transaction." That was not the finding of the Board. *Nowhere in the Opinion of the Board of Governors, or the Report of the Trial Commissioner, will this Court locate such a finding!* Surely, if the Board's finding was as Complainant suggests, the Board could have clearly stated that finding. Nor would the Board have felt it necessary to continue its Opinion so far beyond a simple recitation of this Court's established ethical rules, to question the propriety of any business dealings between attorneys and clients. On the contrary, the *most* that can be found is that Respondent represented Nath "generally" in other matters, and "participated" in the transaction, *nothing more.* That, and nothing more, was also this Court's factual finding (Opinion, p. 3).

Complainant's contention that Respondent represented Nath in the loan transaction is also disproven by the testimony of the Respondent,[5]

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5. See Smith, Transcript, pp. 276-78, 280-83, 328-30, 339-40, 348-49, 357, 394-95, 397, 399-400, etc.

Charles Towles,[6] and Frederick Whiteside. each of whom testified that Nath had been advised to seek other counsel, and that Respondent would not be performing legal services for Nath or REBSCS in this transaction.[8] Indeed, nowhere in the Record is there testimony from anyone (not even from Nath) that Respondent ever agreed to represent Nath in his dealings with REBSCS!

Respondent must also take issue with other erroneous impressions fostered by Complainant's Response. On page 4 of its Response, for example, Complainant states "the Trial Commissioner and Board found at the meeting where Respondent wrote out the $30,000.00 check, Respondent agreed to prepare for Nath the legal papers necessary to document the transaction between Nath Holdings, Inc. and REBSCS but Respondent never did so." This incomplete statement would lead this Court to erroneously conclude that the Trial Commissioner found that Respondent not only represented Nath in the REBSCS transaction, but neglected a matter entrusted to him. This, however, was *not* his finding. On the contrary, the Trial Commissioner said:

> Smith agreed to document the transaction between Towles and Nath. Nath testified Smith

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6. See Towles, Transcript, pp. 580-82.

7. See Whiteside, Transcript, pp. 563-65.

8. This fact is also confirmed by Nath's own attorney. See Irvin, Transcript, pp. 467-69 and 476-77.

> said he would prepare the necessary paper work to document the transaction and this statement was made at the final closing when Nath signed the check for Thirty Thousand Dollars ($30,000.00). *Smith admitted he said that he would be glad to prepare the documents when they reached an agreement as to what this was.* However, Towles denied that Smith made that statement. No documentation was ever prepared by Smith. *However,* it appears to the Trial Commissioner that there are mitigating factors in this charge, in that *no agreement or understanding was made as to "what this (transaction) was."* Trial Commissioner's Report, pp. 13-14 (our emphasis, and citations to Transcript omitted).

His finding (and the only fair interpretation of his finding) was that the Respondent offered to document the transaction - i.e. serve as a mere scrivener in the transaction - *if and when Nath and Towles agreed as to the terms.* Nath's own testimony was that he never made any subsequent contact with Towles, much less agreed on the nature and terms of the transaction.[9] A mere offer to perform legal services, conditioned upon subsequent agreement of the parties, is not representation nor any evidence of representation. Neither is the fact that this transaction was not documented by Respondent evidence of neglect of a matter entrusted

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9. See Nath, Transcript, pp. 103, 105-06, 114-15, 119-20.

to him.[10] On the contrary, such a conditional offer confirms the sworn testimony that Smith was not representing Nath, and did not act as Nath's attorney, in this transaction. To conditionally offer to do what one has already obligated himself to do would be highly illogical, and would in fact make no sense at all. It is also wholly illogical to believe (as Complainant contends) that Respondent, while advising Nath of the conflict of interest and to secure separate counsel for that particular transaction, was nonetheless proceeding to represent Nath in that very transaction. Advice to procure another attorney, in connection with conflict disclosures, is a part of refusing representaton, and is not consistent with proceeding with such representation. The evidence simply does *not* prove "... that Respondent acted as Dr. Nath's attorney and advisor, with respect to the REBSCS investment," (Complainant's Response, p. 3).

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10. The Trial Commissioner found that Respondent's offer was conditioned on Nath and Towles agreeing on what they wished him to prepare. But, as the Trial Commissioner also found, Towles and Nath never agreed as to what they wished Respondent to prepare. *No violation of DR 6-101(A)(3) could have occurred, because the conditions of Respondent's offer to document the transaction were never met by Nath or Towles, and nothing was in fact ever entrusted to Respondent to perform.*

Indeed, the testimony of both Nath (see Nath, Transcript, p. 115) and his accountant (see Eakle, Transcript, p. 216) demonstrated that in *all* transactions in which Respondent represented Nath, Respondent's documentation was meticulous. *The fact that this particular transaction was not documented clearly supports, and is much more consistent with, Respondent's proven refusal to represent Nath, than with any alleged representation and subsequent neglect.*

Unfortunately Complainant's Response contains other factual errors and illogical conclusions, which are not supported by any evidence, much less "*substantial*," or more appropriately "clear and convincing" evidence.[11] The following are some further examples:

1.) Throughout its Response Complainant refers to the transaction as Nath's "investment" in REBSCS. On the contrary, it was, as this Court found, *a loan*. The check said "loan," and even Nath testified that the word "loan" was written on it according to Nath's own directions,[12] and without any consultation with or advice from Respondent (See Nath, Transcript, p. 99).

2.) Further, Complainant erroneously refers to the transaction as "Nath's" investment. The loan was not made by Nath at all. The loan was made by H. Nath Holdings, Inc., a corporation which Respondent never represented and from which he never received a fee of any type (See Smith, Transcript, pp. 328-29).

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11. See *Addington* v. *Texas*, 441 U.S. 418, 423-24 (1979); *Santosky* v. *Kramer*, 455 U.S. 745 (1982); and, *Re Ruffalo*, 390 U.S. 544 (1968).

12. It was Carrell Eakle, Nath's accountant, who advised Nath to make a loan to REBSCS, instead of buying stock, in order to be able to deduct potential losses more easily. See Nath, Transcript, pp. 78-79; and Eakle, Transcript, p. 188, 202-03.

3.) Complainant's statement (on p. 7 of its Response) that "Smith *contends* he told Nath to seek other counsel" (our emphasis) is misleading.[13] It is undisputed that Respondent advised Nath to procure separate representation in this transaction.

4.) At page 8 of its Response, the Complainant's dilemma is apparent. It there contends that, even though Respondent told Nath to seek other counsel, Nath had a right to expect Respondent to independently represent him and protect his interests. But such representation of Nath by Respondent would have been in violation of the principles set forth in *KBA* v. Roberts, Ky., 579 S.W.2d 107 (1979), the very case Complainant cites as controlling authority. By arguing that Respondent should have zealously represented Nath's interests, Complainant ignores REBSCS and Towles, and their interests, and advocates the very same "taking sides" against a "client" that the *Roberts* case condemns. *Nowhere* in the Record is there any evidence that Towles

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13. Complainant's statement is inconsistent with this Court's Opinion and conflicts with the findings of the Trial Commissioner and Board of Governors. It further conflicts with Nath's own admissions to his attorney, David Irvin, and with the sworn testimony of Respondent, Frederick Whiteside, and Charles Towles. See footnotes 5, 6, 7 and 8 for references to their recorded testimony.

> and/or REBSCS waived their rights in such a manner as would have (in compliance with *Roberts*) allowed Respondent to side with Nath. And, without such a waiver or consent from Towles and REBSCS, Respondent could not take sides and still comply with the *Roberts* case and this Court's rules. Towles testified that Respondent made it clear to both of them (Nath and Towles) that he would represent neither of them in this transaction (See Towles, Transcript, pp. 580-82). The fact that Respondent thereafter prepared no documents on behalf of Nath or REBSCS is *not* evidence of neglect of a matter entrusted to him. On the contrary, where there is no representation, one cannot logically expect documentation. By refusing to represent either Nath or REBSCS in this transaction, Respondent complied completely with the rules of ethics and particularly those outlined in the *Roberts* opinion.

The evidence clearly proves that *Smith did not represent Nath in this transaction!* The Trial Commissioner *did not* find such representation - the Board *did not* - and this Court also declined to make such a finding. As we read Complainant's Response, it is clear that no violation of the ethical rules of this Court can be found, without there having first been established that Respondent represented Nath in *this particular transaction.* Such a finding *has not been* and *cannot*

properly be made in this case. Indeed, we believe Complainant's Response effectively demonstrates that, under the facts independently found by this Court, Respondent cannot properly be suspended.

We are confident that this Court will carefully consider Respondent's Petition, and again decline to adopt the unsupported "findings" urged by Complainant. This proceeding has lasted nearly *three years*, and has now been widely publicized. As a result, Respondent has already suffered severe and probably irreparable damage to his reputation and career. This Court can and should minimize this unjust injury by dismissing these unproven charges.

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* * * * * * *

RENDERED: October 12, 1983
AS MODIFIED: July 5, 1984
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 83-SC-144-KB

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V. **IN SUPREME COURT**

ERIC S. SMITH — RESPONDENT

OPINION OF THE COURT

This is a disciplinary case in which respondent was charged with unethical and unprofessional conduct. The Board of Governors of the Kentucky Bar Association found respondent guilty of unethical and unprofessional conduct and recommended that he be suspended from the practice of law for a period of eighteen months.

We have made an independent review of the record, the transcript and considered the briefs and arguments of the parties. We adopt the decision of the Board of Governors.

Respondent represented a Dr. Nath who paid him a retainer and employed respondent to organize a corporation to take care of some other interests of Nath. Respondent was paid a retainer by this corporation. Dr. Nath frequently consulted with respondent and visited his office frequently. It was in respondent's of-

fice that Dr. Nath met Towles and thus began the scenario that ended in this disciplinary proceeding.

Respondent became acquainted with Towles and organized a corporation for him, REBSCS (Real Estate Buyers and Sellers Consultant Services). Towles was attempting to organize and sell a system whereby private individuals could be instructed on how to buy and sell options on real estate and be members of a referral network within which a person who procured an option could communicate with others who might know of a buyer and arrange the sale of the option for a fee. Respondent performed the legal work with an agreement that Towles would pay respondent an attorney fee of five percent (5%) of the gross earnings of the business plus the option to purchase five percent (5%) equity in the business. In addition, respondent received the right to inspect the books of the corporation, to prevent its sale of stock, reorganization, or disbursement of any amounts in excess of $1,000 without written consent of respondent.

Respondent spent substantial time on the enterprise, designing a computer network linking franchised realtors with each other and with private real estate investors. In view of the amount of services performed by respondent, an addendum to the agreement was executed providing respondent with an option to acquire (an additional 20 percent) *from Towles a number of shares of capital stock as shall equal twenty-five percent (25%) of all outstanding shares* of REBSCS Inc's stock.

Respondent permitted Towles to use a vacant office in his building to work on REBSCS related matters, *use of secretarial help and telephone.*

It was there that Dr. Nath first saw Towles, and after inquiry about the business and being on the lookout for business deals, Dr. Nath became interested. The upshot was that Dr. Nath, *through a newly organized corporation,* made an unsecured loan to REBSCS. (Later on) *Within four weeks,* due to personal problems experienced by Towles, REBSCS became moribund, and Dr. Nath lost any hope of the loan being repaid. At the time of the complaint against respondent, REBSCS had a minimal bank balance.

It is in the events leading up to the loan that the Kentucky Bar Association has charged respondent with unethical and unprofessional conduct.

We do not attempt to unravel all the contradictory testimony regarding what Dr. Nath testified respondent said and did *in order to persuade Dr. Nath to invest in REBSCS* and what respondent testified that he said and did *in denial.*

It is uncontradicted that (respondent prepared the check in the sum of $30,000 representing a loan from Dr. Nath to REBSCS.) *Nath Holdings was formed by respondent on February 13, 1980, and the certificate of incorporation was issued on February 13, 1980. Nath gave respondent a check for $30,200 on the same day and a bank account for the corporation was*

opened by respondent. Respondent was registered agent for service of process and used his office as mailing address for the corporation. Whether or not Nath Holdings was set up for the purpose of making the investment or loan, the timing leads to that inference.

When the meeting consumating the transaction took place, respondent had prepared a check on Nath Holdings made to REBSCS in the amount of $30,000 as a loan in exchange for convertible debenture with conversion within five years into an amount equal to ten percent (10%) of the total shares in REBSCS.

This check was voided at the request of Dr. Nath, and respondent prepared another check marked "loan." There was no security *or promissory note. Nath testified respondent told him all that would be taken care of later. Respondent denied this and testified he could not under the circumstances perform any service for REBSCS. In any event, REBSCS received the check. On that date REBSCS had a bank balance of $73.31.* This money was quickly dispensed, first $10,000 to Towles to repay for expenses and later $5,500 to Towles to repay for expenses. The bank balance of REBSCS shortly was reduced to about $41.

Respondent's defense that it was not established that he represented Dr. Nath in this transaction is a non-defense.

Respondent (represented Towles and REBSCS generally;) *had performed all the legal work for REBSCS and* he owned *a contingency* (an) interest in

REBSCS. *Respondent's office address was used as a mailing address for REBSCS.* Respondent also represented Dr. Nath and *one of* his corporations generally. *We consider Nath Holdings as an extension of Dr. Nath personally.*

Whether Dr. Nath knew that respondent owned an interest in REBSCS and whether Dr. Nath knew that Towles planned to reimburse himself for $10,000 in expenses after the loan are beside the point.

Respondent (prepared) *engaged in these activities culminating in preparing* a check and, to that extent, participated in a transaction whereby one client lent money (another of respondent's clients) to a corporation in which respondent had (an) *a substantial* interest. A lawyer simply cannot (sustain a plea of no conflict of interest) *defend against a charge of unethical and unprofessional conduct* in such a scenario. In placing himself in this position, respondent incurs the penalty imposed as recommended by the Kentucky Board of Bar Governors to this court. It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty.

This situation is one of first impression in this Commonwealth and should illustrate that we are committed to the proposition that, in financial dealings with a client, a lawyer must exercise the utmost good faith and fidelity to a client and not place himself or herself in a position of (conflict of interest such) *par-*

ticipating in a transaction, such as here, so as to bring the bench and bar into disrepute. The (display of poor judgment) *unethical and unprofessional conduct* here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of respondent. *The contractual right of respondent to prevent disbursement of amounts in excess of $1,000 on behalf of REBSCS imposed a responsibility on respondent to see that disbursements were in accordance with his statement to Nath that the loan, with the exception of $10,000 to Towles to repay for personal expenses, was to be used exclusively for promotional purposes. So far as we can tell from the record, none of the loan was used for promotional purposes.*

Accordingly, it is ordered that respondent be suspended from the practice of law in this Commonwealth for a period of eighteen months and that he inform his clients in compliance with SCR 3.390, and pay the costs of this proceeding.

All concur except Stephens, C.J., who did not sit.

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* * * * * * *

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SCR 3.130(1).

Except for Ethical Considerations and Disciplinary Rules in conflict with Rule 3.135, the Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Inquiry Tribunal may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

SCR 3.150(1).

Nothing connected with a disciplinary case shall be made public unless so ordered by the Court. Upon request of the Retirement and Removal Commission

the director shall make available to the Commission any of its records pertinent to an investigation by the Commission. [Note: by order entered April 27, 1981, the Supreme Court of Kentucky directed that, effective July 1, 1981, excepting those proceedings in which this Court determines either that a private reprimand or that no administrative action whatsoever is proper and which therefore must remain confidential, in such other matters, considered by this Court under SCR 3.370 and SCR 4.290 which by SCR 3.150 and SCR 4.130 are to be kept confidential until otherwise ordered by this Court, the entire record in the proceeding shall be considered public at such time as this Court's opinion becomes final under CR 76.30].

* * * * * * *

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FILE NO. 84-541

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

ERIC S. SMITH ..... PETITIONER

versus

KENTUCKY BAR ASSOCIATION ..... RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS FOR REVIEW

1. **Whether the Kentucky Supreme Court's suspension of petitioner's law license was based on a charge of which he had no prior notice thereby violating his right to due process.**
2. **Whether the Kentucky Supreme Court enlarged and retroactively applied a vague disciplinary standard thereby violating petitioner's right to due process.**

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IN THE

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OCTOBER TERM, 1984
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THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

APPLICABLE COURT RULES
SUPREME COURT OF THE UNITED STATES
RULE 8. DISBARMENT.

Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, such member forthwith may be suspended from practice before this Court. Such member thereupon will be afforded the opportunity to show good cause, within 40 days, why disbarment should not be effectuated. Upon his response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

SUPREME COURT OF KENTUCKY

Rule 3.130 ABA Code of Professional Responsibility Recognized as Authority

(1) Except for Ethical Considerations and Disciplinary Rules in conflict with Rule 3.135, the Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Inquiry Tribunal may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

Rule 3.150 Proceedings Not Public; Exception

(1) Nothing connected with a disciplinary case shall be made public unless so ordered by the Court. Upon request of the Retirement and Removal Commission the director shall make available to the Commission any of its records pertinent to an investigation by the Commission.

Rule 3.300 Rights of Respondent Against Whom a Charge Has Been Filed

The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, hearing before a Trial Commissioner. He shall have the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses: and the production of books, papers and documents or other writings except those contained in the investigative file or association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a

full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

COUNTERSTATEMENT OF THE CASE

The case concerns a decision by the Supreme Court of Kentucky to suspend petitioner from the practice of law in the Commonwealth of Kentucky for eighteen months. The case began when one of petitioner's clients, Dr. Nath, filed a complaint with the Kentucky Bar Association (hereinafter referred to as KBA) against petitioner thereby initiating an investigation by the Inquiry Tribunal of the KBA. Petitioner was served with Nath's complaint and he filed a response.

On October 29, 1981, the Inquiry Tribunal issued a formal charge of unethical conduct against petitioner which is set forth in petitioner's appendix pages 40a - 45a. The charge contained a detailed statement of the allegations of fact concerning petitioner's involvement and participation in his client, Nath, making an unsecured loan of $30,000 to REBSCS. REBSCS was a corporation which petitioner formed and represented as a lawyer. Petitioner had a personal financial interest in REBSCS. The charge cited certain provisions of the Code of Professional Responsibility which petitioner was alleged to have violated. The charge further stated that petitioner was guilty of unethical and unprofessional conduct tending to bring the bar of Kentucky into disrepute. The essence of the charge was that petitioner had violated ethical duties he owed to Nath by engaging in conflicts of interest, neglecting legal matters entrusted to petitioner, and making false or deceptive statements to Nath.

Petitioner was served with the charge and he filed an answer. An evidentiary hearing was held before a trial commissioner which lasted two full days. At the hearing petitioner was afforded every opportunity to cross-examine the witnesses called against him. Petitioner testified at great length and introduced numerous documents and records into evidence. Petitioner was also permitted to introduce the testimony of any witnesses he wanted in order to support his version of what had occurred. The record of evidence produced at the hearing was voluminous and exhaustive. The evidence completely addressed every relevant aspect of petitioner's involvement with REBSCS, and all the facts and circumstances surrounding petitioner's participation in Nath loaning $30,000 to REBSCS.

After the hearing petitioner and respondent filed extensive briefs with the trial commissioner. The trial commisioner issued a report containing advisory findings of fact. The commissioner's report is set forth in petitioner's appendix pages 24a - 39a. The trial commissioner found petitioner guilty of many of the allegations of fact contained in the charge.

The trial commissioner's report was submitted to the Board of Governors of the KBA. The parties filed extensive briefs with the Board of Governors arguing the facts and the law. Petitioner took advantage of this opportunity to vigorously disagree with some of the trial commissioner's advisory findings of fact. After reviewing the entire record the Board of Governors adopted the trial commissioner's findings and by a vote of 11-0 found petitioner guilty of unethical conduct. The Board recommended to the Kentucky Supreme Court that petitioner be found guilty and suspended from the practice of law for eighteen months. A copy of the Board's opinion is set forth in petitioner's appendix pages 14a - 23a.

Petitioner disagreed with the Board of Governors and he exercised his right to request judicial review of the Board's decision by the Kentucky Supreme Court. The parties filed extensive briefs and on October 12, 1983, the Kentucky Supreme Court rendered an opinion adopting the decision of the Board of Governos and ordering that petitioner's law license be suspended for eighteen months. A copy of said opinion is set forth in petitioner's appendix pages 9a - 13a.

Petitioner was dissatisfied and filed a petition for rehearing and modification in the Kentucky Supreme Court. Petitioner argued in part that the Kentucky Court was in effect creating a new rule of ethics and applying it retroactively in violation of his constitutional right to due process of law. The KBA filed a response to the petition for rehearing requesting the Kentucky Court to clarify its opinion by more fully explaining the facts and the law which formed the basis for the decision to suspend petitioner from the practice of law.

On July 5, 1984, the Kentucky Court rendered a modified opinion and entered an order denying the petition for rehearing. The modified opinion of the Kentucky Court is set forth in petitioner' appendix pages 3a - 8a.

ARGUMENT

I. THE KENTUCKY SUPREME COURT'S SUSPENSION OF PETITIONER FROM THE PRACTICE OF LAW WAS BASED ON THE CHARGE OF WHICH HE HAD PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD. THE KENTUCKY SUPREME COURT DID NOT SUBSTITUTE A NEW CHARGE AND DID NOT VIOLATE THE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS.

The touchstone of procedural due process is that a per-

son who is accused of unlawful conduct must have fair notice of the allegations of misconduct and an opportunity to be heard. Respondent is confident that when this Court reviews the the charge, the trial commissioner's report, the opinion of the Board of Governors, and the opinion of the Kentucky Supreme Court, several important facts will be obvious. First, the petitioner had full and fair notice of the charges against him and the factual allegations of misconduct. Second, the petitioner was afforded a full and fair opportunity at every stage of the disciplinary process to introduce evidence and argue his case. He was afforded the opportunity to be heard at the investigative stage before the Inquiry Tribunal, at the evidentiary hearing before the trial commissioner, before the Board of Governors and in the Kentucky Supreme Court. Third, the opinion of the Kentucky Court was based on the charge issued by the Inquiry Tribunal and the decision of the Board of Governors.

The Supreme Court of Kentucky has held that disciplinary proceedings in Kentucky are neither criminal nor quasi-criminal. Disciplinary proceedings are civil in nature and are inquiries into what may have constituted unethical or unprofessional conduct. *Kentucky Bar Association* v. *Signer*, 558 S.W.2d 582 (Ky. 1977); *In re Edge*, 282 S.W.2d 830 (1955); *Louisville Bar Association* v. *Hubbard*, 282 Ky. 734, 139 S.W.2d 773 (1940); *In re Gilbert*, 274 Ky. 187, 118 S.W.2d 535 (1938); *In re Stump*, 272 Ky. 593, 114 S.W.2d 1094 (1938). The Supreme Court of Kentucky has reserved to itself the authority to make the final findings of fact and final conclusions of law in bar disciplinary cases. The reports and recommendations of the trial commissioner and the Board of Governors are merely advisory. *Kentucky State Bar Association* v.

Stivers, 475 S.W.2d 900 (Ky. 1972); *Kentucky Bar Association* v. *Franklin*, 534 S.W.2d 459 (Ky. 1976); *Kentucky Bar Association* v. *Collis*, 535 S.W.2d 95 (Ky. 1975) cert den 423 U.S. 1049; *Kentucky Bar Association* v. *Tucker*, 535 S.W.2d 97 (Ky. 1975) cert den 423 U.S. 1054; *Kentucky Bar Association* v. *Cohen*, 625 S.W.2d 573 (Ky. 1981) cert den 456 U.S. 1007.

Petitioner contends that the Kentucky Court suspended him for conduct entirely different than that alleged in the charge upon which he had been tried. Petitioner's argument is without merit. A review of the Kentucky Court's opinion shows that it was based on factual allegations contained in the charge, and based on the reports of the trial commissioner and the Board of Governors. In the modified opinion which the Kentucky Supreme Court rendered on July 5, 1984, the Kentucky Court expressly stated: "We adopt the decision of the Board of Governors." See Petitioner's Appendix page 2a.

The thrust of petitioner's argument is that the Kentucky Court found him guilty of unethical conduct based solely on his mere participation in the loan transaction. Petitioner seeks to characterize his involvement in the loan transaction as being innocuous and simply performing ministerial acts such as preparing the $30,000 check. In its modified opinion rendered on July 5, 1984, the Kentucky Supreme Court stated:

> It is in the events leading up to the loan that the Kentucky Bar Association has charged respondent with unethical and unprofessional conduct.
>
> We do not attempt to unravel all the contradictory testimony regarding what Dr. Nath testified respondent said and did in order to persuade Dr. Nath

to invest in REBSCS and what respondent testified that he said and did in denial.

It is uncontradicted that Nath Holdings was formed by respondent on February 13, 1980, and the certificate of incorporation was issued on February 13, 1980. Nath gave respondent a check for $30,200 on the same day and a bank account for the corporation was opened by respondent. Respondent was registered agent for service of process and used his office as mailing address for the corporation. Whether or not Nath Holdings was set up for the purpose of making the investment or loan, the timing leads to that inference.

When the meeting consummating the transaction took place, respondent had prepared a check on Nath Holdings made to REBSCS in the amount of $30,000 as a loan in exchange for convertible debenture with conversion within five years into an amount equal to ten percent (10%) of the total shares in REBSCS.

This check was voided at the request of Dr. Nath, and respondent prepared another check marked loan. There was no security or promissory note. Nath testified respondent told him all that would be taken care of later. Respondent denied this and testified he could not under the circumstances perform any service for REBSCS. In any event, REBSCS had a bank balance of $73.31. This money was quickly dispensed, first $10,000 to Towles to repay for expenses and later $5,500 to Towles to repay for expenses. The bank balance of REBSCS shortly was reduced to about $41.

Respondent's defense that it was not established that he represented Dr. Nath in this transaction is a non-defense.

Respondent had performed all the legal work for REBSCS and he owned a contingency interest in REBSCS. Respondent's office address was used as a mailing address for REBSCS. Respondent also represented Dr. Nath and one of his corporations

generally. We consider Nath Holdings as an extension of Dr. Nath personally.

Whether Dr. Nath knew that respondent owned an interest in REBSCS and whether Dr. Nath knew that Towles planned to reimburse himself for $10,000 in expenses after the loan are beside the point.

Respondent engaged in these activities culminating in preparing a check and, to that extent, participated in a transaction whereby one client lent money to a corporation in which respondent had a substantial interest. A lawyer simply cannot defend against a charge of unethical and unprofessional conduct in such a scenario. In placing himself in this position, respondent incurs the penalty imposed as recommended by the Kentucky Board of Bar Governors to this court. It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty.

This situation is one of first impression in this Commonwealth and should illustrate that we are committed to the proposition that, in financial dealings with a client, a lawyer must exercise the utmost good faith and fidelity to a client and not place himself or herself in a position of participating in a transaction, such as here, so as to bring the bench and bar into disrepute. The unethical and unprofessional conduct here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of respondent. Petitioner's Appendix 4a - 8a.

The Kentucky Court essentially found that an attorney-client relationship existed between petitioner and Dr. Nath, and that petitioner violated fiduciary duties he owed to Dr. Nath. Such a decision by the Kentucky Court is consistent with the charge issued against petitioner and the opinion of the Board of Governors. Throughout the

period of time when petitioner was discussing REBSCS with Nath up to and including the date Nath invested the $30,000, petitioner was being paid by Nath a monthly retainer fee for personal legal advice and a monthly retainer fee to represent Nath Chartered. Petitioner gave legal advice to Nath about forming Nath Holdings to serve as the vehicle for making the investment in REBSCS. Petitioner incorporated Nath Holdings for Dr. Nath as his attorney and petitioner also opened the bank account for Nath Holdings for the specific purpose of enabling Dr. Nath to invest in REBSCS. The $30,000 which was used to fund Nath Holdings came from Nath Chartered and petitioner was general counsel for Nath Chartered on retainer. Petitioner wrote out the check for Nath to disburse the $30,000 from Nath Holdings to REBSCS. Petitioner's act of writing out the check for Nath's signature was only one of several significant actions that petitioner took to advise and assist Nath to accomplish the REBSCS investment.

It should be noted that the charge issued by the Inquiry Tribunal against petitioner not only alleged that he had violated certain provisions of the Code of Professional Responsibility but also alleged that petitioner had engaged in "unethical and unprofessional conduct tending to bring the bench and bar of Kentucky into disrepute." Petitioner's Appendix 44a - 45a. Rule 3.130(1) of the Kentucky Supreme Court provides in part: "the Inquiry Tribunal may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." In its final opinion the Kentucky Supreme Court held that petitioner is guilty of unethical and unprofessional conduct. Petitioner's Appendix page 6a. The Kentucky Court's decision was based on the Inquiry

Tribunal's charge, the record of evidence, the trial commissioner's report and the opinion of the Board of Governors. The Kentucky Court did not create a new charge or "substitute" charges as claimed by petitioner.

Petitioner cites the case of *In re Ruffalo*, 390 U.S. 554 (1968), which is not applicable to the facts and circumstances in the present case. Ruffalo was a lawyer who was the subject of disciplinary charges in the State of Ohio. Ruffalo was charged with using a man named Orlando to solicit clients. A hearing was held at which Ruffalo and Orlando testified that Ruffalo only employed Orlando as an investigator. After the testimony a new, additional charge of ethical misconduct was levied against Ruffalo on the ground that he had hired Orlando to investigate Orlando's other employer, a railroad company. The Ohio Supreme Court ultimately disbarred Ruffalo based on the new charge which had been added after Ruffalo had testified. The United States Court of Appeals for the Sixth Circuit disbarred Ruffalo from practicing law before the Sixth Circuit based on his disbarment in Ohio. Ruffalo appealed to the United States Supreme Court which reversed. The United States Supreme Court held that Ruffalo had been deprived of procedural due process. This Court held that Ruffalo was entitled to fair notice of the charges against him before he testified.

In the present case it is clear that petitioner had fair notice of the charge against him prior to the evidentiary hearing and no new charges were issued against him after he had testified. The charge issued by the Inquiry Tribunal was detailed and concerned petitioner's conduct in a loan transaction between two of his clients, Nath and REBSCS. The charge expressly stated the facts and circumstances surrounding petitioner's involvement in the loan trans-

action from the incorporation of Nath Holdings to the issuance of the $30,000 check. The charge alleged that such actions by petitioner not only violated certain provisions of the Code of Professional Responsibility but also constituted unethical and unprofessional conduct tending to bring the bar into disrepute. It is obvious that petitioner's argument that he was not given fair notice of the charge is without merit and *Ruffalo, supra,* is inapplicable.

Petitioner, on pages 15 and 19 of his petition for writ of certiorari, complains that the disciplinary proceeding was conducted in secrecy and that he was somehow unfairly restricted from procuring and producing evidence in his own defense. Respondent disagrees. Rule 3.150(1) of the Kentucky Supreme Court provides in part: "Nothing connected with a disciplinary case shall be made public unless so ordered by the Court." The purpose of Rule 3.150(1) is to maintain the confidentiality of disciplinary proceedings from the media and members of the general public who are not involved in the case. Rule 3.150(1) cannot and should not be interpreted as preventing petitioner from investigating, interviewing witnesses and presenting evidence. Rule 3.150(1) must be read in conjunction with Rule 3.300 of the Kentucky Supreme Court which provides:

> The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in

> the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

If petitioner honestly and sincerely believed that Rule 3.150(1) was unfairly restricting him from investigating and discussing the case with witnesses, all he had to do was file a motion with the Kentucky Supreme Court requesting relief. Petitioner never filed such a motion with the Kentucky Court. In fact, petitioner has not demonstrated that his access to witnesses or evidence was signficantly restricted by Rule 3.150(1). Petitioner only refers to an *amicus curiae* brief filed in the Kentucky Supreme Court. The record of evidence taken before the trial commissioner shows that petitioner did call several witnesses to testify on his behalf.

II. THE KENTUCKY SUPREME COURT HAS NOT ENLARGED AND RETROACTIVELY APPLIED A VAGUE DISCIPLINARY STANDARD TO SUSPEND PETITIONER'S LICENSE TO PRACTICE LAW AND HAS NOT VIOLATED HIS RIGHT TO DUE PROCESS.

Petitioner argues that his right to due process was violated because at the time he became involved in the loan transaction with his client, Nath, petitioner did not have reasonable, prior notice that such actions could be considered unethical and grounds for discipline. Petitioner again argues that the Kentucky Supreme Court based its

decision to suspend his law license solely on the ground that he had merely "participated" in a loan transaction between clients.

As respondent has previously discussed in this brief, supra, the Kentucky Court decided to suspend petitioner's law license because he violated fiduciary duties owed to his client, Nath. The Kentucky Court held that in financial dealings with a client a lawyer must exercise the utmost good faith and fidelity to a client. It should not come as a surprise to petitioner or any other reasonable lawyer that the Kentucky Supreme Court would recognize and enforce such a standard of ethical conduct. Prior to petitioner engaging in his misconduct there was law readily available in Kentucky which gave him adequate notice that his actions could be deemed improper. In *Daugherty* v. *Runner*, 581 S.W.2d 12 (Ky. App. 1978), discretionary review denied by Kentucky Supreme Court June 5, 1979, the Kentucky Court of Appeals held at p. 16:

> What is the level of service demanded from members of the legal profession? The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties. The relationship is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal. Since the relationship of attorney-client is one fiduciary in nature, the attorney had the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest.

In the case of *In re Ray*, 390 S.W.2d 899 (Ky. 1965), the former Kentucky Court of Appeals (now Kentucky Supreme Court) suspended Ray from the practice of law for six months. In its opinion the Kentucky Court stated the following facts and conclusions of law at p. 890:

> Bibb was the owner of a piece of mortgaged real estate. He fell behind in his payments and was threatened with foreclosure. He then went to Ray seeking legal advice and assistance. It appeared that Bibb needed financial rather than legal aid. At Ray's suggestion, Bibb deeded the land to Ray, as "trustee," under an agreement that Ray would transfer it back to Bibb or to anyone Bibb named upon payment to Ray of his expenditures and his charges *for use of his credit* and for his services in saving the property from foreclosure. Subsequently the property was transferred at Bibb's request to his brother-in-law, for a price of $4,000. After the mortgage and all expenses were paid including a fee to Ray for legal services, Ray had left a sum of around $1,300, which he claimed as his own.
>
> The foregoing statement of facts consists only of facts asserted or admitted by Ray; it does not include disputed assertions by Bibb of fraudulent acts and representations by Ray.
>
> Although the Trial Committee stated in its report that the only issue to be considered was whether Ray had acted "fraudulently" in the handling of the real estate transaction, actually the committee based its recommendation of disciplinary action on a finding of a *breach of a fiduciary relationship.*
>
> By way of response in this Court, Ray asserts among other things (1) that he was denied the opportunity before the Trial Committee to show fully the motives behind the bringing of the charges against

him, and (2) that the evidence does not warrant a finding of fraud on his part. It is our opinion that neither of these matters is of any significance.

What is significant is that Bibb came to Ray owning a substantial equity in a piece of real estate, and when his dealings with Ray were completed he had nothing while Ray had $1,300. Obviously there was a breach of professional ethics in the achievement of such a result, and it is immaterial by what name the breach be called. We think also it is immaterial (except as regards the *degree* of the offense) that Ray may have done what he did with full agreement of Bibb. It is our opinion that an attorney may not properly be permitted to switch hats, from that of an officer of the court to that of a money lender, in the middle of his dealings with a client.

We are not convinced that Ray was guilty of any fraudulent conduct or that he was deliberately seeking to take undue advantage of his client's financial predicament. *It appears that his offense was attributable mainly to his failure to appreciate fully the high trust responsibilities that rest upon an attorney in a financial transaction with his client.* Under the circumstances we think a six-month suspension is adequate discipline. (Emphasis supplied).

Generally, as well as in Kentucky, a client is entitled to expect from his or her attorney not just competent technical performance, but *uberrima fides*, defined in *Black's Law Dictionary* (4th Edition; West, 1968) as:

> The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception however slight . . . perfect good faith, concealing nothing . . . .

See also 7 Am.Jur.2d *Attorneys at Law* § 120:

> An attorney must faithfully, honestly, and consistently represent the interests and protect the rights of his client. He is bound to discharge his duties to his client with the strictest fidelity, to observe the highest and utmost good faith toward him, and to inform his client promptly of any known information important to him. An attorney may not withhold from his client information acquired in his capacity as an attorney (and) may not use the information to his own advantage . . . " (citations omitted)

Kentucky Courts have consistently held that the principal of *uberrima fides* is almost *per se* inconsistent with a lawyer's entangling his personal and financial affairs with those of his client, particularly where the entanglement involves the subject of the underlying representation. There is a flat presumption that the lawyer has overreached the client; see *Palms' Administrators* v. *Howard*, 112 S.W. 1110 (Ky. 1908); *Hunt* v. *Picklesimer*, 162 S.W.2d 27 (Ky. 1942); see also 7 Am.Jur.2d *Attorneys at Law* § 125.

There is also a concomitent duty to disclose any fact or matter gained in the course of the representation which would be material to the client, or to his interests; see *Arrowood* v. *Lyon*, 279 S.W.2d 801 (Ky. 1955). The attorney is under a specific obligation to recognize and promptly inform the client of adverse circumstances; see *Daughterty* v. *Runner, supra*, 581 S.W.2d at 17-18. A lawyer cannot escape this obligation by express disclaimers or reservations; *Owen* v. *Neely*, 471 S.W.2d 705 (Ky. 1971).

Furthermore, the Code of Professional Responsibility which has been adopted by the Kentucky Supreme Court

pursuant to Rule 3.130 contains the following Ethical Considerations:

> EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.
>
> EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

As an attorney actively practicing law in Kentucky, petitioner either knew or should have known about the above cited law. Petitioner either knew or should have known that he owed certain fiduciary duties to his client, Nath, and that if he violated his fiduciary duties, disciplinary sanctions could be imposed on him pursuant to Rule 3 of the Kentucky Supreme Court.

Petitioner argues that his due process rights have been violated because the Kentucky Supreme Court suspended him based on the standard that his actions constituted unethical and unprofessional conduct tending to bring the bar into disrepute. Petitioner claims that such a standard is ambiguous and void for vagueness because it does not give him adequate prior notice as to what types of conduct by attorneys are prohibited. As stated supra, respondent

submits that based on the law which existed in Kentucky at the time petitioner engaged in the acts of misconduct petitioner had fair and adequate prior notice that his violation of fiduciary duties owed to a client could result in the imposition of disciplinary sanctions with regard to his law license.

In *Kentucky Bar Association* v. *Vincent*, 537 S.W.2d 171 (Ky. 1976) the Kentucky Supreme Court suspended Vincent from the practice of law for six months based on his conviction for wilfully failing to file income tax returns. The Kentucky Court went on to state the following criterion for disciplining attorneys at p. 173:

> We have long extended the arm of patience and understanding to members of our legal profession when they have been subjected to disciplinary proceedings. It may be that we have defined the limits of conduct too broadly in speaking in subjective terms such as 'conviction of an offense involving moral turpitude or of being convicted of a serious misdemeanor or a felony.' In any event, the real criterion is and should be whether the attorney is guilty of such unprofessional and unethical conduct which is calculated to bring the bench and bar into disrepute. It is beyond cavil that an attorney who is convicted of an offense involving moral turpitude, or who is convicted of an intentional and serious misdemeanor, or who is convicted of a felony, is guilty of such conduct as is calculated to bring the bench and bar into disrepute. Respondent was permitted, without limitation, to fully indulge himself in the introduction of evidence to support his position in his effort to build up and make realistic his claim to extenuating circumstances. He is an officer of the court (Kentucky State Bar Association v. Taylor, Ky., 482 S.W.2d 574), and it is his

> duty—yes, even more so, it is his responsibility—to conduct his personal and professional life in a manner as to be above reproach. Is this too much to ask of any attorney? We think not. Other than one's own confidante, no person occupies such close relationship to the general public as do the members of the legal profession. It is the attorney to whom the intimacies of family relations are confided; it is the attorney who is entrusted with advising as to the management and disposition of the family estate; it is the attorney who is entrusted with the protection of our constitutional and statutory rights. Such a burden resting upon the members of the legal profession must not be taken lightly.
>
> '. . . that you will faithfully execute, to the best of your ability, the office of attorney at law . . .' are not idle words, to which all attorneys have pledged their allegiance. The conduct of even one attorney which would embarrass the legal profession will not be tolerated.

The Kentucky Supreme Court has adopted Rule 3.130(1) which provides that attorneys may be disciplined for violating the Code of Professional Responsibility and "for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." The Kentucky Supreme Court has held that this standard is not void for vagueness. *Kentucky Bar Association* v. *Kramer,* 555 S.W.2d 245 (Ky. 1977); *Kentucky Bar Association* v. *Ricketts,* 599 S.W.2d 454 (Ky. 1980).

It is interesting and informative to compare the Kentucky Court's standard of "unethical and unprofessional conduct tending to bring the bench and bar into disrepute" with the standard used by the Supreme Court of the United States. Rule 8 of the United States Supreme Court provides in part:

> Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, *or has engaged in conduct unbecoming a member of the Bar of this Court,* such member forthwith may be suspended from practice before this Court. (Emphasis supplied.)

The Kentucky Court's standard is no more void for vagueness than the standard adopted by the United States Supreme Court which is that a lawyer may be suspended for engaging in conduct unbecoming a member of the bar of the United States Supreme Court.

Another signficiant Kentucky case is *Nicholson* v. *Judicial Retirement and Removal Commission,* 562 S.W.2d 306 (1978). Nicholson was charged with having so ineptly handled a RCr 11.42 proceeding that he brought the judicial office into disrepute. The Kentucky Supreme Court rejected Nicholson's claim that the constitutional authorization to discipline judges "for good cause" was so vague as to violate his right to due process of law holding:

> Nicholson can not claim a lack of notice that his conduct would be subject to review by the Commission. The authority to remove members of the judiciary for good cause is not ambiguous to the members of the legal profession. Such phrases as "for cause" or "for good cause" are terms of art which possess a special meaning manifest to the profession when used in this context. These terms denote a legal cause which affects the ability and fitness of a judge to perform the duties of the office. *Napolitano* v. *Ward,* 317 F.Supp. 79 (D.C. III 1970); *Sarisohn* v. *Appellate Div., Second Dept., Supreme Court,* 265 F.Supp. 455 (D.C., N.Y. 1967).

> Such a standard is not so vague as to violate due process requirements. Although the specific acts of misconduct encompassed within the phrase are numerous ample guidelines for the determination of proper conduct may be found in the ethical standards applicable to lawyers and judges adopted by national and state bar associations and in the moral standards expected of judicial officers by the public. *Sarisohn* v. *Appellate Div., supra.* Such a standard is no more vague than that of "good behavior" used with respect to federal judges contained in Section 1 of Article 3 of the United States Constitution. *Friedman* v. *State,* 24 N.Y.2d 528, 301 N.Y.S.2d 484, 249 N.E.2d 369 (1969). *Id.* at 308-309.

In the case of *In re Ruffalo,* supra, Justices Marshall and White discussed this issue at pp. 554-555:

> A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals for the Sixth Circuit had provided petitioner and other members of its bar with a general standard for disbarment:
>
> 'When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court.' Rule 6(3), Court of Appeals for the Sixth Circuit.

> *Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment.* This class of conduct certainly includes the criminal offenses traditionally known as malum in se. *It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession.* (Emphasis supplied.)

The true test of whether a law or regulation is void for vagueness is to apply it to the specific fact situation before the Court. When the standard of "unethical and unprofessional conduct tending to bring the bench and bar into disrepute" is applied to petitioner and his violation of fiduciary duties owed to a client, it is clear that petitioner's actions are a proper subject for discipline. The Kentucky Supreme Court had every reason to expect petitioner and every other Kentucky attorney to exercise the utmost good faith and fidelity to a client when the attorney is involved in financial dealings with a client under the facts and circumstances of this particular case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this Brief for Respondent in Opposition were mailed to counsel for petitioner, Bert T. Combs, 2800 Citizens Plaza, Louisville, Kentucky 40202, and Ben L. Kessinger, Jr., 400 Bank of Lexington Building, 101 East Vine Street, Lexington, Kentucky, this 1st day of November, 1984.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

NO. 84-541 (3)

ERIC S. SMITH, *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER IN REPLY

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER IN REPLY

Respondent avoids the issues raised in the Petition,[1] and effectively admits that if the facts are as presented in the Petition, the decision of the Kentucky Court *cannot* properly stand. Nevertheless, the misimpressions which its Opposition Brief fosters necessitate this Reply.

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1. Respondent's Brief in Opposition does *not* challenge this Court's jurisdiction to review Petitioner's case, or claim the existence of other adequate state grounds as a basis for the Kentucky Supreme Court's decision. Nor does it take issue with the fact that Petitioner's constitutional claims were timely and properly raised in the proceedings below.

ARGUMENT IN REPLY

1. THE KENTUCKY COURT'S OPINION IS NEITHER BASED UPON NOR CONSISTENT WITH THE CHARGE, TRIAL COMMISSIONER'S REPORT, OR OPINION OF THE BOARD OF GOVERNORS.

Respondent urges this Court to accept as fact that the Kentucky Court's July 5th Opinion is "based upon" and "consistent with" the original Charge against Petitioner, the trial commissioner's Report, and Board's Opinion. For example, on page 7, it is stated:

> . . . the Kentucky Court's opinion shows that it was based on factual allegations contained in the charge, and based on the report of the trial commissioner and the Board of Governors. In the modified opinion . . . the Kentucky Court expressly stated: "We adopt the decision of the Board of Governors."

Such statements erroneously imply that the Board's findings of fact and conclusions of law, and not merely the Board's decision to suspend Petitioner, were adopted by the Kentucky Court.

The Opposition Brief fails to point out that the Kentucky Court's October 12th Opinion *also* stated: "(w)e adopt the decision of the Board of Governors." Appendix at 9a. Yet, when Petitioner raised his due process challenge to that Opinion, by pointing out to the Court that it had based his suspension on a ground not complained of in the Charge,[2] counsel for Respondent did *not* defend that Opinion as being consistent with the Charge, trial commissioner's Report, or Board's Opinion. On the contrary, he urged the Court to modify its Opinion, in order to avoid Petitioner's constitutional challenges, stating:

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2. See Petition for Rehearing, Appendix at 50a, 54a.

> . . . the most appropriate, expeditious and effective way for the Court to modify its Opinion *would be to adopt the findings of fact and conclusions of law of the trial commissioner and the Board of Governors.* . . . All such objections by respondent (Petitioner herein) can be easily resolved *if the court were to modify its Opinion to follow the recommendations of the trial commissioner and the Board of Governors.* Response to Petition for Rehearing (hereinafter "Response"), Appendix at 79a-80a (emphasis added).

Despite his requests, and contrary to what he now implies, the Kentucky Court's July 5th Opinion did *not* adopt, and is not "consistent with," the Board's findings of fact and conclusions of law.[3] Although the Court modified its October 12th Opinion, it did *not* change the basis for Petitioner's suspension.

These facts clearly demonstrate that counsel for Respondent's new interpretation of the Court's July 5th Opinion is unfounded. They just as clearly reveal the inconsistency of his attempt to defend in this Court essentially the same Opinion which he unsuccessfully urged the Kentucky Court to modify.

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3. If the Kentucky Court had intended to adopt the findings of the Board, then it would have so stated, as it did in *Kentucky Bar Association* v. *Gregory*, 659 S.W. 2d 204 (Ky. 1983), an opinion *rendered on the same day as the Court's original opinion in this case.* The Court in *Gregory* stated: "(t)he Court, having considered the record and the briefs of the parties, *adopts the findings* and recommendations of the Board of Governors. . . (emphasis added). *Id. Not* finding Petitioner guilty of the misconduct alleged in the Charge or condemned in the Board's Opinion, the Court in this case did *not* adopt the Board's findings.

2. THERE WAS NO SEPARATE CHARGE OF "UNETHICAL CONDUCT."

At page 10, counsel again reverses his position, by suggesting that the Charge "also alleged that petitioner had engaged in 'unethical and unprofessional conduct . . .'." He now argues that the words "unethical and unprofessional conduct" specified a separate offense, distinct from the specific disciplinary rules which the Charge alleged Petitioner had violated. The record, however, reveals that counsel for Respondent *never* previously suggested the existence of a separate charge of "unethical conduct" at *any* stage in the proceedings below. His arguments in this Court cannot now disguise the fact that this separate charge did *not* exist, until announced by the Kentucky Court to justify an otherwise unsupportable suspension.[4]

The words "unethical and unprofessional conduct," however, refer *only* to "actions" which the Inquiry Tribunal alleged to have "violated Disciplinary Rules 1-102(A)(4), 5-101(A), 5-104(A), 5-105(A) and 6-101(A)(3),"[5] and *cannot be logically interpreted to state a separate, unrelated charge.* The Inquiry Tribunal *never* intended to

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4. See Petition for Certiorari at 6-7, n. 21 at 14. Counsel for Respondent's presentation of this case highlights the danger of aggregation of roles in Kentucky disciplinary proceedings. It is inconceivable that the Board of Governors, 16 busy attorneys (meeting once a month on all Kentucky Bar Association business), reviewed the over 650 page transcript (and extensive briefs) as its counsel suggests. A review of the briefs and Board's Opinion will reveal, that the Board relied heavily on its counsel/employee's presentation. If, as in this case, an unfair or inaccurate presentation is made by its counsel, then the natural reliance by the Board upon its counsel/employee (if combined with any deference by the Kentucky Court to the Board, its enforcement agency) may well foreclose hope of a fair and impartial hearing, especially when, as here, oral argument is denied.

5. Charge, Appendix at 44a-45a.

condemn Petitioner's "participation" in the loan transaction, in the absence of any violation of those listed rules.

Significantly, the trial commissioner who conducted the only hearing on the Tribunal's Charge made *no* mention of a separate charge of "unethical conduct" in his "Statement of Charges," nor elsewhere in his Report. Appendix at 24a-39a. His Report reveals that Petitioner's preparation of the loan check, his formation of Nath Holdings, Inc., and his opening of its bank account (all at Nath's request), were *never* alleged to be "unethical conduct," nor was the propriety of such "participation" ever questioned in that hearing.[6]

Counsel for Respondent further erroneously implies that the Board condemned Petitioner's mere "participation" in the loan transaction. The Board, however, condemned as "unethical" only actions in violation of the cited rules, stating that ". . . in sum, *this conduct* has brought the bench and bar into disrepute." Board's Opinion, Appendix at 16a (emphasis added).

The Opposition Brief is therefore at odds with the Inquiry Tribunal, trial commissioner, and Board of Governors, each of which *never* mentioned the existence of a separate "unethical conduct" charge. Consequently, counsel for Respondent's argument, at page 11, that *In re Ruffalo*, 390 U.S. 554 (1968) is inapplicable, because "peti-

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6. On page 4, counsel for Respondent misrepresents the scope of the hearing by stating: "(t)he evidence (at the hearing) completely addressed . . . all the facts and circumstances surrounding petitioner's participation in Nath loaning $30,000 to REBSCS." The evidence presented at the hearing, however, dealt *only* with whether the disciplinary rules enumerated in the Charge were violated, and did *not* address the propriety of Petitioner's "involvement" or "participation" in the loan transaction. See Report of Trial Commissioner, Appendix at 24a-26a, 38a-39a.

tioner had fair notice of the charge against him prior to the evidentiary hearing and no new charges were issued against him after he had testified," is clearly without merit. The Court's decision to suspend Petitioner, upon a ground which was *never* charged or tried, clearly violated procedural due process principles enunciated by this Court in *Ruffalo*.

3. THE COURT *DID NOT* FIND THAT PETITIONER REPRESENTED NATH IN THE LOAN TRANSACTION.

Counsel for Respondent now implies what he unsuccessfully urged the Kentucky Court to find[7]—that Petitioner represented Nath in the loan transaction. The Court, however, did *not* do so, and found only that Petitioner served as Nath's attorney in *other* matters.

This may further explain why the Court left unchanged the essence of its October 12th Opinion, and did not find violations of the specific disciplinary rules enumerated in the Charge and Board's Opinion. As pointed out in the Petition for Rehearing, "... violation of those rules requires a finding that conflicting attorney-client relationships existed *with regard to the particular transaction in question.*" Appendix at 51a-52a.

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7. Response, Appendix at 80a-82a. By repeated references to Nath as Petitioner's "client," the misimpression is fostered that Petitioner served as Nath's attorney *in the loan transaction*, a misimpression which is reinforced by counsel for Respondent's statement, at page 9, that "(t)he Kentucky Court essentially found that an attorney-client relationship existed between petitioner and Dr. Nath...."

4. THE VAGUE "UNETHICAL CONDUCT" STANDARD, *AS UNFORESEEABLY ENLARGED AND RETROACTIVELY APPLIED* IN THIS CASE, DEPRIVED PETITIONER OF FAIR NOTICE AND DUE PROCESS.

Respondent closes with an argument apparently intended to convince this Court that Kentucky's "unprofessional and unethical conduct" standard is not void by reason of its vagueness. Petitioner, however, has not challenged the constitutionality of that vague standard, only its *unforeseeable enlargement* and *retroactive application* in this case.

The real question is whether Petitioner could reasonably be deemed to have been on notice that the Kentucky Court would condemn the conduct described in its Opinions. The Opposition Brief obscures this question by stating (at pages 14, 18, and 23) that the Kentucky Court found "violation of fiduciary duties." However, the words "fiduciary duties" do *not* appear, and no "violation of fiduciary duties" was found, described, or complained of, in either of the Court's Opinions.[8] The Court, in its final Opinion, stated only that a lawyer must " . . . not place himself or herself in a position of *participating in a transaction*, such as here, so as to bring the bench and bar into disrepute." July 5th Opinion, Appendix at 6a (emphasis added).

Despite the erroneous impressions fostered by the Opposition Brief,[9] Petitioner had *no notice*, at the time of the loan transaction, that his mere "participation" could be

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8. See Annotated July 5th Opinion, Appendix at 132a-137a.

9. The Brief in Opposition contains many other factual inaccuracies. The following are some further examples:

(continued on page 8)

condemned.[10] The Opposition Brief ignores the fact that 23 practicing attorneys from across Kentucky (and a local county bar association) endorsed an amicus brief (Appendix at 90a-116a) challenging the Court's determination that Petitioner's "participation" in that loan transaction was "unethical." When coupled with the Court's own admission that this case "is one of first impression" (July 5th Opinion, Appendix at 6a), the arguments in the Brief Amicus Curiae demonstrate that Kentucky attorneys had *no prior notice* that the Kentucky Supreme Court would consider such conduct to be "unethical."

(footnote 9, continued from page 7)

1.) On page 4, counsel for Respondent erroneously states that "(t)he trial commissioner found petitioner guilty of many of the allegations of fact contained in the charge." The trial commissioner, being only authorized to find facts, drew *no* conclusions as to guilt or innocence. See Petition at 18-19.

2.) Contrary to what is implied at page 6, Petitioner was afforded *no* opportunity to be heard before the Inquiry Tribunal, or to orally argue his case before the Board or Kentucky Court.

3.) On page 10, is an extremely distorted recitation of "facts," without citation to the Kentucky Court's Opinions. Many of these "facts" have been unsuccessfully urged upon the Kentucky Court by counsel for Respondent, and are refuted in Petitioner's Reply Brief, Appendix at 117a-131a.

10. Respondent's reliance upon *Daugherty* v. *Runner*, 581 S.W. 2d 12 (Ky. App. 1978) is misplaced. *Daugherty* is neither a disciplinary case, nor a decision of the Kentucky Supreme Court. Despite Respondent's argument, at page 14, dicta from that opinion could *not* logically be considered to have established a *disciplinary* standard of which all Kentucky attorneys should be aware. Further, *In re Ray*, 390 S.W. 2d 899 (Ky. 1965), quoted on pages 15 and 16, *cannot* be read to be applicable to a situation where, as here, there was *no* representation in the loan transaction, and where Petitioner did *not* benefit at the expense of a client. Certainly the attorneys who endorsed the Brief Amicus Curiae did *not* believe these cases to be applicable to the facts of this case.

5. SECRECY IN THE PROCEEDINGS DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

Respondent does not directly address Petitioner's argument that by substituting the new charge, during its final deliberations, the Kentucky Court transformed the proceedings into a "secret trial," similar to the type which this Court condemned in *In re Oliver*, 333 U.S. 257, 269 (1945).[11] Respondent apparently concedes that, if the Kentucky Court did suspend Petitioner on a ground not alleged in the Charge, the Kentucky Court's actions deprived Petitioner of procedural due process.

CONCLUSION

Respondent's arguments offer no reliable basis for a denial of certiorari. The Petition demonstrates that the Kentucky Court suspended Petitioner from the practice of law, *solely* upon an unforeseeable ground which had *never* been charged or tried. The Kentucky Court's actions violated due process principles established by this Court in *Ruffalo; In re Oliver*, 333 U.S. 257 (1948); *Cole* v. *Arkansas*, 333 U.S. 196 (1948) and, *DeJonge* v. *Oregon*, 299 U.S. 353 (1937). Further, by rejecting *Ruffalo*, the Kentucky Court's

11. Respondent only argues that the operation of SCR 3.150(1) did not restrict Petitioner from investigating his case or presenting evidence. During the proceedings, however, Petitioner was approached and informed by Nath that he (Nath) had been advised that Petitioner would probably pay him $30,000, if he filed the disciplinary complaint. His admission seriously undermined, and gave sound reason to question, the veracity of *all* of Respondent's witnesses. However, in fear of violation of SCR 3.150(1), counsel for Petitioner did *not* independently investigate this matter, and requested Respondent investigate the circumstances surrounding Nath's admitted abuse of the disciplinary process. Respondent declined to investigate, nor would it present the matter to the Kentucky Supreme Court. In fact, Respondent opposed Petitioner's motion requesting the Kentucky Court to order such an investigation.

Opinion conflicts with decisions of other state courts, which appear to uniformly recognize that the principles of *Ruffalo* extend to state disciplinary proceedings. See, e.g., *People* v. *Emeson*, 638 P.2d 293 (1981); *Walker* v. *Supreme Court of Arkansas Committee on Professional Conduct*, 628 S.W. 2d 552 (Ark. 1982). Thus, the Petition presents *two* of the three grounds for certiorari specified in Rule 17 of this Court: a conflict with decisions of this Court (Rule 17.1(c)), and a conflict with decisions of other state courts of last resort (Rule 17.1(b)).

For the reasons set forth above, and in the Petition for a Writ of Certiorari, Petitioner respectfully prays that this Court will issue a Writ of Certiorari to review the final Opinion of the Kentucky Supreme Court.

Respectfully submitted,

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